

IN THE
Supreme Court of the United States

J. W. GRUETTER

VS.

CUMBERLAND TELEPHONE
& TELEGRAPH CO.

NO. 3578

PETITION FOR WRIT OF MANDAMUS

*To the Honorable, the Chief Justice and Associate Justices of the
Supreme Court of the United States:*

Your petitioner, J. W. Gruetter, respectfully shows to this
Honorable Court:

That on the 27th day of November, A.D. 1908, your petitioner
commenced an action at law in the Circuit Court in and for
Franklin County, State of Tennessee, against the Cumberland
Telephone & Telegraph Company, by procuring from the Clerk
of said Court a summons for said Defendant by executing a good
and solvent cost bond (in conformity to the statutes of the State

of Tennessee), returnable to the December term of said Court, to recover from said Cumberland Telephone & Telegraph Company, a corporation, on a cause of action set forth in the declaration, hereinafter set out, the sum of twenty thousand dollars penalty, for the wrongful and unlawful failure to supply Plaintiff with telephone connection and facilities for a period of two hundred days, thereby unlawfully discriminating against said Petitioner, Gruetter, contrary to the statute of the State of Tennessee. The said summons was served upon the Defendant, Cumberland Telephone & Telegraph Company, by W. E. Brown, deputy sheriff, on December 3, 1908.

Said summons is in the following words and figures, to wit:

(The Summons.)

"STATE OF TENNESSEE.

"To the Sheriff of Franklin County—Greeting:

"You are hereby commanded to summons Cumberland Telephone & Telegraph Company, a corporation, if to be found in your County, to appear before the Judge of our Circuit Court, to be held for the County of Franklin, at the courthouse in the town of Winchester, on the 3rd Monday in December, next, then and there to answer J. W. Gruetter in an action to recover the sum of twenty thousand dollars (\$20,000.00) for its wrongful and unlawful failure to supply him, the said Gruetter, with telephone connection and facilities for a period of two hundred days, from February, 1908, to November 26, 1908, thereby discriminating against Plaintiff Gruetter. Herein fail not, and have you then and there this writ.

"Witness, J. J. Turner, Clerk of said Court, at office, the 3rd Monday in August, A.D. 1908.

"J. J. TURNER, Clerk.

"We acknowledge ourselves indebted to the Cumberland Telephone & Telegraph Company, the Defendant in the above suit, in the sum of \$250.00, to be void on condition J. W. Gruetter prosecutes his action of damages this day commenced against said Cumberland Telephone & Telegraph Company, in the Circuit Court of Franklin County, with effect, or if payment of all costs and damages incident on failure thereof, and pay all costs which may at any time be adjudged against him.

"Witness my hand and seal, this 27th day of November, 1908.

"J. W. GRUETTER,

"C. RUEF.

"Executed as commanded by summoning S. H. Loyd, local manager of the Cumberland Telephone & Telegraph Company at Winchester, Tennessee, Franklin County, December 3, 1908.

"W. E. BROWN, *Deputy Sheriff.*"

That on December 17, 1908, Petitioner, by his attorneys, W. L. Myers and Crownover & Crabtree, filed his declaration in said case as required by the laws of Tennessee, which declaration is as follows:

(The Declaration.)

"J. W. GRUETTER vs. CUMBERLAND TELEPHONE & TELEGRAPH
COMPANY.

—
"IN THE CIRCUIT COURT OF FRANKLIN COUNTY, TENNESSEE.
—

"The Plaintiff, J. W. Gruetter, a citizen of Franklin County, Tennessee, sues the Defendant, Cumberland Telephone & Telegraph Company, a corporation chartered under

the laws of Kentucky, for twenty thousand dollars, for that, on, to wit: The 15th day of February, 1908, the Defendant owned and operated at Sewanee, Tennessee, and adjoining territory, and was engaged in a general telephone business (and still owns and operates said business), and that the Defendant on said day agreed to place a telephone in Plaintiff's dwelling house, and give him telephone connection and facilities at his place of residence in Sewanee, Tennessee, and afterwards on the 10th of April, 1908, accepted from Plaintiff a written order to put in said telephone as above set out for the term of one year, at a monthly rental of \$2.00, and Plaintiff complied in every way with all the regulations imposed by the said Telephone Company upon its patrons, or proposed patrons, but the Defendant failed to give the Plaintiff telephone connections and facilities at his said place of residence, and thereby violated Section 2, Chapter 66, of the Acts of 1885, of the State of Tennessee, the same being Section 1842 of Shannon's Code of Tennessee. Said section of law above referred to, which Plaintiff charges Defendant has violated, is as follows:

“Every telephone company doing business within this State, and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulations of the Company; and no such Company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations, nor shall such Company discriminate against any individual or company in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of \$100.00 for each day such Company continues such discrimination and refuses such facilities after compliance, or offer to comply, with

the reasonable regulations, a time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused.'

"Plaintiff avers that Defendant violated said law, in that it failed to give him telephonic connection and facilities furnished others in the same class, and in like condition as himself with telephonic connection and facilities, thereby violating the above law and discriminating against him.

"Plaintiff avers that he has complied with all the reasonable regulations of the Defendant Company in the matter of his application for said telephonic connection and facilities, but said Telephone Company in violation of said law, and in discrimination against him, failed to furnish said telephonic connection and facilities, as above set out, from the 15th day of February, 1908, to and including the 26th day of November, 1908. And he further avers that the time to furnish said telephonic connection and facilities elapsed, towit: Two hundred days to the 26th day of November, 1908.

"This suit is for \$100.00 each day, the penalty provided by said statute for 200 days above described, making an aggregate penalty of \$20,000.00.

"Therefore, Plaintiff avers that he has a right of action against the Defendant Company corporation, as aforesaid, for a penalty of \$100.00 each day for 200 successive days next before the filing of this suit, amounting to \$20,000.00, for which he brings this, his action, and demands a jury to try the issues in this case.

"CROWNOVER & CRABTREE,

"W. L. MYERS,

"Attorneys for Plaintiff."

Your Petitioner further shows the Court that on December 17, 1908, and before the day of commencement of said December term of court aforesaid, and before it was required by the laws of the State of Tennessee, or the rule of said State Court in which

said action was brought, to answer or plead to the suit filed therein as aforesaid, the said Cumberland Telephone & Telegraph Company, the Defendant in said action, by its agents and attorneys, made and filed in said action in said Circuit Court in and for the County of Franklin and State of Tennessee, for the removal of said action from said Court last aforesaid into the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, the Circuit Court of the United States to be held in the District where such action was pending, the petition and bond required for removal of causes by the third section of the Act of Congress of August 13, 1888, amendatory of the Acts of March 3, 1887, and March 3, 1875, which said petition was and is in the words and figures following:

“J. W. GRUETTER vs. CUMBERLAND TELEPHONE & TELEGRAPH
COMPANY,

PENDING IN THE CIRCUIT COURT OF FRANKLIN COUNTY AT
WINCHESTER, TENNESSEE.

PETITION FOR REMOVAL.

“Your Petitioner, the Cumberland Telephone & Telegraph Company, respectfully represents and states to the Court that it is the Defendant in the above-styled cause, which is of a civil nature, and that the matter and amount in dispute in said case exceeds the sum of value of \$2,000, exclusive of interests and costs; and, that the controversy herein is wholly between citizens of different States, to wit: The Plaintiff, W. J. Gruetter, who was at the time of the commencement of this suit and still is a citizen of the State

of Tennessee, and your petitioner, the Cumberland Telephone & Telegraph Company, a body politic and corporate, having its legal domicile in Christian County, Kentucky, chartered and incorporated under the laws of said State, and was at the time of the commencement of this suit and still is a citizen of the State of Kentucky, and of no other State;

"And your Petitioner desires to remove this suit before the trial thereof into the next Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, to be held at Nashville in said District.

"And your Petitioner herewith offers good and sufficient surety for its entering into said Circuit Court of the United States for the Middle Division of the Middle District of Tennessee on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

"And your Petitioner therefore prays that said surety and bond may be accepted that this suit may be removed into the next Circuit Court of the United States to be had in the Middle Division of the Middle District of Tennessee, pursuant to the Statutes of the United States in such cases made and provided, and that no further proceedings will be had herein in this suit, and it will ever pray.

"CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

"By JAMES E. CALDWELL, President.

"T. A. EMBREY,

"WM. L. GRANBERRY,

"Solicitors for Petitioner."

"STATE OF TENNESSEE,

"COUNTY OF DAVIDSON.

"James E. Caldwell makes oath and says that he is President of the Cumberland Telephone & Telegraph Com-

pany, a body politic and corporate, the petitioner above named, and that the foregoing petition is true to the best of his knowledge, information and belief.

“JAMES E. CALDWELL.

“Subscribed and sworn to before me, this the 7th day of December, 1908.

“HARVEY D. JACOB, *Notary Public*.

“(Harvey D. Jacob,)
(Notary Public,)
(Davidson Co., Tenn.)”

(Bond for Removal.)

“KNOW ALL MEN BY THESE PRESENTS: That we, the Cumberland Telephone & Telegraph Company, a body politic and corporate under the laws of the State of Kentucky, as principal, and James E. Caldwell and William L. Granberry, of Nashville, Tennessee, as sureties, are held and firmly bound unto W. J. Gruetter, in the penal sum of \$250.00, which sum to be well and truly paid, we hereby jointly and severally by these presents bind our heirs, representatives, and successors.

“UPON CONDITION, HOWEVER, that whereas the said Cumberland Telephone & Telegraph Company has filed its petition in the Circuit Court of Franklin County, Tennessee, at Winchester, for the removal of a certain cause therein pending wherein said W. J. Gruetter is Plaintiff and the said Cumberland Telephone & Telegraph Company is Defendant, to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee.

“Now, if the said Cumberland Telephone & Telegraph Company shall enter into said Circuit Court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all the costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was wrong-

fully or improperly removed thereto, then this obligation shall be void; otherwise, it shall remain in full force and effect.

"In witness whereof, we have hereunto set our hands and seals, the 7th day of December, 1908.

"CUMBERLAND TELEPHONE & TELEGRAPH COMPANY,

"By JAMES E. CALDWELL, *President.*

"JAMES E. CALDWELL,

"WM. L. GRANBERRY,

"T. A. EMBREY."

"(Filed in my office December 17, 1908.

J. J. TURNER, *Clerk.*)"

Petitioner, J. W. Gruetter, demurred to said petition, and filed his demurrer on December 18, 1908, which is in the words as follows:

(The Demurrer.)

"J. W. GRUETTER vs. CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

No. 807. IN THE CIRCUIT COURT OF FRANKLIN COUNTY,
DECEMBER TERM, 1908.

"The Plaintiff avers that the Defendant's petition for removal of this cause to the Federal Court filed on December 17, 1908, and the matters therein contained are insufficient, in law, to preclude and prevent this Court from taking cognizance of this action, and he demurs to said petition because this is a suit to recover a penalty, and the action is not of a civil nature that can be removed for the reasons set out in said petition, to wit, diverse citizenship.

"CROWNOVER & CRABTREE,

"W. L. MYERS,

"Attorneys for Plaintiff."

The cause came on to be heard before the Hon. M. M. Allison, Circuit Judge, who, upon the consideration of which, had the following order entered:

(Order of State Court.)

"Whereupon after oral argument upon said demurrer to said petition and full consideration of briefs by counsel for both Plaintiff and the Defendant, the Court held that this is a suit to recover a penalty under the statute set out in the declaration and that the action is not of a civil nature that can be removed to the Federal Court for the reasons set out in said petition, to wit, diverse citizenship; and therefore sustains said demurrer, dismissed said petition and denied the prayer thereof, granting an order to Petitioner, the Cumberland Telephone & Telegraph Company, ordering a removal of said cause to the United States Circuit Court for the Middle Division of the Middle District of Tennessee.

"To the action of the Court in sustaining said demurrer, dismissing said petition and in denying the prayer thereof for the removal of said cause to the United States Circuit Court for the Middle Division of the Middle District of Tennessee, the Defendant in said case and Petitioner in said petition excepts, and tenders this its bill of exceptions, which is signed by the Court and made a part of the record in this case on this the 22d day of December, 1908.

"M. M. ALLISON, *Judge.*"

"(Filed in my office January 11, 1909.

"J. J. TURNER, *Clerk.*")"

"J. J. TURNER, *Clerk.*")"

The Cumberland Telephone & Telegraph Company excepted to the order of the State Circuit Judge, made and entered in this case, as aforesaid, and made and tendered its wayside bill of exceptions, which showed that the Plaintiff, J. W. Gruetter, read

the original writ or summons issued on November 27, 1908, and its declaraton, as above set out, and that the Defendant Cumberland Telephone & Telegraph Company read its petition for removal and bond offered in support thereof, as above set out, and then Plaintiff, J. W. Gruetter, read his demurrer as hereinabove set out, which constituted the whole record up to the hearing by said State Circuit Judge.

The Defendant, Cumberland Telephone & Telegraph Company, not being satisfied with the order of said State Circuit Judge, as aforesaid, procured a certified copy of the whole record in this case in the Circuit Court of Franklin County, Tennessee, duly certified by the Clerk of said Circuit Court, and filed said certified copy or transcript on January 18, 1909, in the Circuit Court of the United States for the removal of said cause to said Circuit Court of the United States as attempted in said petition for removal, as provided by law in cases for removal where the State Circuit Court errs in refusing to allow the case to be removed to the Circuit Court of the United States. Said case is No. 3578 in said Circuit Court of the United States.

And your Petitioner further shows unto the Court that upon the removal, as aforesaid, of said action from said Circuit Court in and for Franklin County, State of Tennessee, to said Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, and before your Petitioner had in any way appeared in said suit, or had done or been a party to any act, doing or proceeding in said suit, or had in any way acknowledged that said suit had been properly removed from said State Court to said Circuit Court of the United States, by appearance in, or by in any way prosecuting his said cause in said Court, or doing anything whatsoever in said cause, or connected with, or incident

to the prosecution thereof, or had by any act or proceeding in said Court acknowledged that said suit had been properly removed, or that said Circuit Court of the United States had jurisdiction by virtue of said removal, or otherwise, to retain said suit, or to take jurisdiction of said cause so removed as aforesaid, or to hold any plea therein, or take any step in said cause, your Petitioner appearing specially and solely for the purpose of the motion next hereinafter mentioned, and expressly denying that said Court had jurisdiction of said cause, as appears on the face of said motion, did on the — day of February, A.D. 1909, file in said Circuit Court of the United States, in said cause, a motion to remand said cause so removed, as aforesaid, to the Circuit Court of Franklin County, State of Tennessee, from whence it was removed, which said motion was and is in the words and figures following:

(Motion to Remand.)

**"J. W. GRUETTER vs. CUMBERLAND TELEPHONE & TELEGRAPH
COMPANY.**

"No. 3578. U. S. CIRCUIT COURT.

"Now, at this day comes Plaintiff, by his attorneys, W. L. Myers and Crownover & Crabtree, and appearing specially for the purposes of this motion only, saving and reserving any and all objections which he has to the manifold imperfections in the mode, manner, and method of the removal papers, and expressly denying that this Court has jurisdiction of this cause, or of the Plaintiff therein, respectfully moves the Court to remand this cause to the Circuit Court of Franklin County, Tennessee, from whence

it was removed, because this suit does not involve a controversy or dispute properly within the jurisdiction of this Court, for the following reasons as appear upon the face of the record herein, towit:

"(1) Because this is a suit to recover a penalty, and the action is not of a civil nature that can be removed for the reasons set out in said petition, towit, diverse citizenship.

"(2) Because the petition for removal and the record in this cause do not show that this suit is sought to be removed to the Circuit Court of the United States of the district in which either the Plaintiff or the Defendant resides.

"(3) Because the Defendant does not specifically pray for removal of this cause to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, and the cause is not one within the original jurisdiction of this Court, hence this Court cannot acquire jurisdiction by removal.

"W. L. MYERS,

"CROWNOVER & CRABTREE,

"Attorneys for Plaintiff."

And your Petitioner further shows to the Court that afterwards such proceedings were had in said Circuit Court of the United States, upon and in respect to said motion to remand, that said motion was duly heard by said Court and by the Honorable E. T. Sanford, Judge of the District Court of the United States, for said district, at the time holding the said Circuit Court of the United States, in pursuance to the statutes of the United States in said cases made and provided, and the motion having been duly considered by said Court, said Court did on the 14th day of September, A.D. 1909, render its decision and judgment upon and in respect of said motion, and did overrule said motion to remand said cause aforesaid, and did announce and file in said Court a memorandum opinion or decision overruling

said motion to remand, which is in the words and figures as follows:

(Memorandum Opinion.)

“IN THE UNITED STATES CIRCUIT COURT AT NASHVILLE.

“J. W. GRUETTER vs. CUMBERLAND TELEPHONE & TELEGRAPH
COMPANY.

“No. 3578. AT LAW.

“MEMORANDUM OPINION ON PLAINTIFF'S MOTION TO REMAND.

“After careful consideration, I have reached the conclusion that the Plaintiff's motion to remand this suit to the State Court, from which it was removed by the Defendant, is not well taken.

“1. The first ground of the motion is that this is a suit to recover a penalty, and not an action of a civil nature that can be removed to the Federal Court on the ground of diverse citizenship.

“While I held in January of this year in the case of *Brown vs. Cumberland Telephone Company*, at Memphis, that a suit of this character brought against a telephone company under the Tennessee Act of 1885, Ch. 66, Sec. 11, is an action for ‘statute penalties’ which, under Sec. 2772 of the Tennessee Code (Shan., 4469), is barred within one year after the cause of action accrues, I am nevertheless of the opinion that although a suit for penalties, it is ‘a suit of a civil nature at law,’ which is removable to the Federal Court under Sec. 2 of the Act of August 13, 1888, Ch. 866 (25 Stat., 433).

“The Tennessee statutes provides that every telephone

company doing business within the State shall supply all applicants for telephones and telephone facilities without discrimination or partiality, and shall not impose any condition or restriction upon any such applicant not imposed impartially upon all persons or companies in like situations, 'under penalty of one hundred dollars for each day such company continues such discrimination and refuses such facilities . . . to be recovered by the applicant whose application is so neglected or refused.'

"It was held by the Circuit Court of Appeals for this circuit in *Kelly vs. Cumberland Telephone Co.*, 160 Fed., 316, that this statute is directed only against discrimination in telephone service and is merely declaratory of the common law obligation of telephone companies not to discriminate, giving a new remedy and enforcing the common law obligation by severe penalties. The statute is, therefore, in its essence, one which merely declares and enforces a common law obligation of a civil nature. It does not create any criminal offense, or provide for any criminal prosecution; it imposes no fine or penalty which may be recovered by the State; it provides for no *qui tam* action by which any injury to the public may be punished by fine; it simply, in its last analysis, recognizes the common law obligation of telephone companies to furnish indiscriminating service, and enforces this obligation by a severe penalty, in the nature of punitive damages, recoverable in a civil action brought by the person against whom there has been a wrongful discrimination.

"In determining whether a suit to enforce a penalty provided by a State statute is one 'of a civil nature' which is removable under section 2 of the Act of August 13, 1888, ch. 866 (25 Stat., 433), correcting the enrollment of the Act of March 3, 1887, and amending the Act of March 3, 1875, the question is not whether the State statute is to be considered as remedial or penal for the purpose of the application of the rule of strict construction, but whether the action

brought to enforce the penalty provided by the statute, is essentially civil in its nature, as distinct from one which is criminal, or quasi criminal, in its nature.

“While the precise question here involved appears never to have been adjudged, I think a just rule, fairly deducible from the trend of authority, and based upon sound reason, is this: that where the statute does not create any criminal offense or provide for any criminal prosecution or for the recovery by the State of any fine or penalty for any public wrong, but merely provides a money penalty for a private wrong, recoverable by the aggrieved party for his own benefit, a suit brought to recover such penalty is in its essence one of a civil nature, even though the penalty imposed by the statute amounts to punitive damages, and is hence removable to the Federal Court.

“‘A civil action is an action brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor.’ Burrell’s Law Dict., 294.

“‘An action is “civil” when it lies to enforce a private right, or redress a private wrong. It is “criminal” when instituted on behalf of the sovereign or commonwealth in order to vindicate the law by the punishment of a public offense.’ Rapalje & Lawrence’s Law Dict., 21.

“A civil action at common law is: ‘An action which has for its object the recovery of private or civil rights or compensation for their infraction.’ Bouvier’s Law Dict., 15th ed., 317.

“In *Huntington vs. Attrill*, 146 U. S., 657, 667, 673,, 676, in which it was held that a State statute making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts, ‘in no sense a criminal or quasi criminal law’ and not a penal law in the international sense so that it could not be enforced in the courts of another State, Mr. Justice Gray, delivering the opinion of the Court, said:

“‘Penal laws, strictly and properly, are those imposing

punishment for an offense committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrong-doer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.

“The action of an owner of property against the hundred to recover damages caused by a mob was said by Justices Willes and Buller to be “penal against the hundred, but certainly remedial as to the sufferer.” *Hyde vs. Cogan*, 2 Doug., 699, 705, 706. A statute giving the right to recover back money lost at gaming, and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer. *Bones vs. Booth*, 2 W. Bl., 1226; *Brandon vs. Pate*, 2 H. Bl., 308; *Grace vs. McElroy*, 1 Allen, 563; *Read vs. Stewart*, 129 Mass., 407, 410; *Cole vs. Groves*, 134 Mass., 471. As said by Mr. Justice Amhurst in the King’s Bench, and repeated by Mr. Justice Wilde in the Supreme Judicial Court of Massachusetts, “it has been held, in many instances, that where a statute gives accumulative damages to the party grieved, it is not a penal action.” *Woodgate vs. Knatchbull*, 2 T. R., 148, 154; *Read vs. Chelmsford*, 16 Pick., 128, 132. Thus a statute giving to a tenant, ousted without notice, double the yearly value of the premises against the landlord, has been held to be “not like a penal law where a punishment is imposed for a crime,” but “rather as a remedial than a penal law,” because “the act indeed does give a penalty, but it is to the party grieved.” *Lake vs. Smith*, 1 Bos. & Pul. (N. R.), 174, 179, 180, 181; *Wilkinson vs. Colley*, 5 Burrow, 2694, 2698. So in an action given by statute to a traveler injured through a defect in a highway, for double damages against the town, it was held unnecessary to aver

that the facts constituted an offense, or to conclude against the form of the statute, because, as Chief Justice Shaw said: "The action is purely remedial, and has none of the characteristics of a penal prosecution. . . . Here the Plaintiff sets out the liability of the town to repair, and an injury to himself from a failure to perform that duty. The law gives him enhanced damages; but still they are recoverable to his own use, and in form and substance the suit calls for indemnity." *Reid vs. Northfield*, 13 Pick., 94, 100, 101.

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: "Wrongs are divisible into two sorts or species; private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed civil injuries: the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community; and are distinguished by the harsher appellation of crimes and misdemeanors." 3 Bl. Com., 2.

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the Courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act."

"In *State vs. Chicago, B. & Q. R. Co.*, 37 Fed., 497, in which it was held that an action brought by the State to recover a forfeiture for an offense declared to be a misdemeanor, was, though civil in form, one of a criminal nature which was not removable to the Federal Court, Mr. Justice Brewer, then Circuit Judge, after citing various authorities

stating the distinction between matters of a civil and a criminal nature, including the definitions from the law dictionaries above quoted, said:

“That a case may partake something of the nature of both is as might be expected, and naturally it is not always clear which element predominates. Thus in a civil action for damages for a tort, punitive damages are sometimes awarded. There is therefore present the double element of a redress of a private injury and the punishment of a public wrong; but, inasmuch as the full recovery goes to the injured party, as he controls the whole proceeding, and the form of the action is civil, it may well be inferred that the civil element predominates, and the action be considered one of a civil nature.’

“And in Black’s *Dillon on Removal of Causes*, Sec. 24, p. 33, the first rule given for distinguishing between actions essentially penal in their character and those of a civil nature, is that ‘when the money to be recovered in the action, though denominated a “fine,” “penalty,” or “forfeiture,” is really for the benefit of a private party who has suffered loss or detriment, the action is civil and not penal;’ citing *Robertson vs. Kottell*, 64 N. H., 430.

“The cases relied on by the Plaintiff are not, I think, in substantial conflict with this rule. Thus, to refer to the principal cases so relied on, in *State vs. Chicago, B. & Q. R. Co.*, *supra*, the suit was held not to be removable on the specific ground that the penalty provided by the statute went entirely to the State, which controlled the litigation and received all the proceeds, and that the aim of the statute was to punish for a violation of the criminal laws of the State; and a similar decision in *State vs. Allegheny Oil Co.*, 85 Fed., 870, was based on the ground that the penalty was due to the State, and was inflicted for a violation of the State statute enacted to secure public and not private rights. In both *State vs. Grand Trunk Ry.*, 3 Fed., 887, and *Lyman vs. Boston & A. R. Co.*, 70 Fed., 409, the suits which were

held to be not removable to the Federal Courts were brought under indictments in the State Courts, under statutes providing for fines against railway companies causing the death of persons by negligence, which should go to the family of the deceased. In the first of these cases the State Court had previously held that a proceeding under the statute was a criminal proceeding for an infraction of the law of the State, which construction was followed by the Federal Court; and in the second, the statute specifically provided that the suit should be prosecuted by indictment, and both the decisions of the State Court that actions under the statute were for a penalty, and the nature of the prescribed procedure were among the grounds upon which the Court concluded that the suit was an action to recover a penalty under a State law, to be exacted partly, if not exclusively, as an act of public law, and in defense of the public justice of the State, and hence not removable. In the case of *Hamilton vs. Brewing Co.*, 100 Fed., 675, the recovery of money paid for intoxicating liquor sold in violation of the State statute evidently was not provided as compensation for any loss or detriment to the buyer or as damages for any private wrong, but solely as a punishment for a violation of the public law in reference to the sale of intoxicating liquors. And in *State vs. Land & Cattle Co.*, 41 Fed., 228, while it was held that under a State statute making it unlawful to graze cattle on public lands unless leased from proper authority, and providing that a violation of the act should be a misdemeanor punishable by fine, a suit brought by the State to recover such fine was one to enforce the criminal law of the State, which was not removable to the Federal Court, it was also said that it seemed that a suit brought by the State under another section of the same act providing that the owner of cattle should be liable to the State in a fixed sum per year for each 640 acres used contrary to the act, to be recovered in a civil action, 'was by the law and in fact a suit of a civil nature, to wit, a suit for

trespass, in which the damages were liquidated by the statute,' and hence removable. See also *State vs. Cattle Company*, 49 Fed., 593. The cases involving a decision of the question whether or not a given statute is remedial or penal for the purpose of the application of the rule of strict construction, likewise have, in my opinion, no direct application to the question under consideration.

"Therefore, after careful consideration of the important question involved, and with great regret that I am unable to concur in the opinion of the learned Circuit Judge of the State Court, I am constrained to conclude that as the Tennessee statute in question creates no criminal offense and provides for no criminal procedure or remedy for any public wrong, but merely for punitive damages for the breach of a common law obligation or private wrong, a suit brought by the injured person to recover the penalty thereby imposed is essentially civil in its nature, and removable to the Federal Court.

"I am strengthened in this view by the fact that under the Act of June 29, 1896, Ch. 3594, 34 Stat., 607, prohibiting interstate carriers from confining live stock in cars longer than twenty-eight consecutive hours without unloading for rest, water and feed, and imposing penalties for a violation of the Act, recoverable in a civil action in the name of the United States, it has been held that, although the statute is penal, an action to recover the penalty is in effect a civil action for debt, and the government is entitled to have a judgment therein reviewed upon writ of error. *United States vs. Baltimore & O. S. W. R. Co.*, 169 Fed., 33, 38, C.C.A., 6th Cir.; *Montana Cent. Ry. vs. United States*, 164 Fed., 100, C.C.A., 9th Cir.; *United States vs. New York, C. & St. L. R. Co.*, 168 Fed., 699, C.C.A., 2nd Cir. Likewise an action brought by the United States against a railroad company under the Safety Appliance Act of March 3, 1893, Ch. 196, 27 Stat., 532, providing a penalty for each violation, recoverable in a suit brought by

the United States Attorney, is a civil action in which the judgment is reviewable at the instance of the government on writ of error. *United States vs. Louisville & N. R. Co.*, 167 Fed., 306, C.C.A.; *United States vs. Illinois C. R. Co.*, 170 Fed., 542, 6 C.C.A.; *Chicago, B. & Q. R. Co. vs. United States*, 170 Fed., 556, 8 C.C.A.

"In *United States vs. Illinois C. R. Co.*, *supra*, Severens, Circuit Judge, delivering the opinion of the Court, said: 'Probably in all the systems of law in the State and Federal governments there are instances where to civil liabilities there are attached penalties, there being something wanton or gross or otherwise peculiar to the liability. Yet such penalties are enforced in civil actions.'

And in *Chicago, B. & Q. R. Co. vs. United States*, *supra*, Adams, Circuit Judge, delivering the opinion, said:

" 'This is not a criminal case. It is a civil action in the nature of the action of debt to recover a penalty, which Congress in its wisdom saw fit to impose upon railroads to secure compliance with certain specified regulations made to promote the safety of passengers and freight carried in interstate commerce, and to protect employes engaged in that service. * * * The Act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly. * * * A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed that liability not as a punishment for a criminal offense, but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which in the opinion of Congress the public weal demanded should be performed by railroad companies.'

"If an action to enforce a money penalty recoverable by the government in its sovereign capacity for breach of a public duty imposed by statute, is a civil action for debt, it follows, a fortiori, that an action to recover a money penalty brought by a party injured by a violation of a common law

obligation and private wrong, and for his sole benefit, is also a civil action.

"The view that a suit to recover the penalties imposed by the Tennessee statute is one of a civil nature within the jurisdiction of a Circuit Court of the United States, furthermore finds strong confirmation in the fact that in the case of *Cumberland Telephone Company vs. Kelly*, above cited, the Circuit Court of Appeals for this circuit entertained and decided on the merits a writ of error in an action brought against the Telephone Company in the Circuit Court of the United States for the Western District of Tennessee to recover penalties under this statute, and remanded the case for a new trial in the Circuit Court, instead of directing that the case be dismissed, as it would have done on its own motion had it been of the opinion that the Circuit Court had no jurisdiction of the case. Such action on the part of the Circuit Court of Appeals, without doubting the jurisdiction of the Circuit Court, is significant as indicating its view that a suit to recover such statutory penalties was one within the jurisdiction of the Federal Courts. *Huntington vs. Attrill*, 146 U. S., 657, 680; *United States vs. Baltimore & O. S. W. R. Co.*, 169 Fed., 33, 39, C.C.A., 6th Cir.

"2. The second ground of the motion to remand, that the petition for removal and the record do not show that this suit is sought to be removed to the Circuit Court of the United States in the District in which either the Plaintiff or Defendant resides, is not well taken.

"It is true that a suit commenced in a State Court in a Federal district in which neither the Plaintiff nor the Defendant resides, cannot be removed to the Circuit Court of the United States of such district by a nonresident defendant on the ground of diversity of citizenship, as such Court would have had no jurisdiction of the same as an original suit under the Acts of 1887-1888, and where the objection to the jurisdiction of such Circuit Court has not

been waived by the Defendant the suit must be remanded to the State Court. *Ex parte Wisner*, 203 U. S., 449; *In re Moore*, 209 U. S., 490; *Western Loan & Savings Co. vs. Mining Co.*, 210 U. S., 368; *Louisville & N. R. Co. vs. Fisher*, 155 Fed., 68, C.C.A., 6th Cir.

"I am of the opinion, however, that the fact that the Plaintiff was a resident of the Middle District of Tennessee at the time the petition for removal was filed, affirmatively appears from the declaration which he filed in the State Court on the same day, December 17, 1908, in which he is described as 'a citizen of Franklin County, Tennessee,' a phrase which in my opinion, giving to the words their natural and obvious meaning, sufficiently describes the Plaintiff as a citizen of Tennessee, and a resident of Franklin County. To describe a person as being of a certain county can only mean, as words are ordinarily used, that he is a resident of that County. See *Grand Trunk Ry. vs. Twitchel*, 59 Fed., 727, C.C.A., 1st Cir., in which this is apparently implied.

"While it is true that the facts necessary to give the Federal Court jurisdiction must affirmatively appear, no precise and technical form of words is required, and it is sufficient if the necessary facts appear in the record, although stated inartificially and not in technical language. See 1 Street's Fed. Pract., sec. 331, p. 192.

"While, therefore, it would have removed all possible doubt on this point if the Defendant's petition for removal had shown the Plaintiff's residence in accordance with the form given in 2 Loveland's Forms of Fed. Pract., 1573—which, since the decision in *ex parte Wisner*, might well be supplemented by averring in terms a residence within the district to whose Circuit Court the removal is sought—I am yet constrained to hold that as the Plaintiff was described in his own declaration filed on the same day as being a citizen of a county which the Court judicially knows to be within such district, it therefore sufficiently appears from

the record that the case was removed to the Circuit Court of the United States for the district in which the Plaintiff then resided, and that the second ground of the motion to remand must be accordingly overruled.

"3. The third ground of the motion to remand, that 'the Defendant does not specifically pray a removal of this cause to the Circuit Court of the United States,' is likewise not well taken. The Defendant in the last paragraph of the petition for removal specifically prays 'that said surety and bond may be accepted that this suit may be removed into the next Circuit Court of the United States,' etc. The meaning of this prayer is unmistakable, and its effect is not destroyed by the obviously inadvertent omission of a semicolon after the word 'accepted.'

"An order will accordingly be entered overruling the motion to remand.

"SANFORD, *Judge*.

"September 13, 1909."

(Filed with Clerk September 14, 1909.)

Said Court of the United States for the district aforesaid will make and enter an order of record that said motion to remand be overruled and denied, in accordance with said opinion. And your petitioner further shows this Court that he has not since appeared in said cause or done any act or thing therein in any way acknowledging the jurisdiction of said Court over said cause or over himself, or waiving his right to object to the jurisdiction thereof over said cause or himself, or acknowledging the right of said Court to retain said cause in said Court by virtue of said removal.

And your Petitioner further shows to the Court that the second section of the Act of Congress, approved April 13, 1888, amendatory of the Act of Congress, approved March 3,

1887, which amended the Act approved March 3, 1875, after providing in the first clause thereof, that causes of a civil nature, in law or in equity, arising under the Constitution or laws, or treaties, of the United States (of which the Circuit Courts of the United States are by said clause given original jurisdiction by the preceding section), may be removed by the Defendant or Defendants therein, to the Circuit Court of the United States for the proper district, then provides in the second clause thereof, as follows: "Any other suit of a *civil nature*, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section" (that is, by said section 1 of said Act), "and which are now pending, or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the Defendant or Defendants therein, being nonresidents of that State."

And your petitioner further shows to the Court that the preceding section (being section 1 of said Act) referred to in said second section of said Act, provides, in the first clause thereof, as follows: "That the Circuit Courts of the United States shall have original cognizance, concurrent with the Courts of the several States, of all suits of a *civil nature*, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and cost, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are Plaintiffs or Petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exists, exclusive of interest and costs, the sum or value aforesaid," and the said clause of said first section goes on and gives jurisdiction of other classes

of suits, but your petitioner further shows the Court that by the next clause of the preceding or first section of said Act, it is provided, among other things, as follows:

“But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court and no civil suit shall be brought before either of said Courts against any person by any original process or proceeding *in any other district than that whereof he is an inhabitant*, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought *only in the district of the residence of either the Plaintiff or Defendant.*”

(1) It will be observed by examining the Acts of Congress above referred to that it provides for removal solely and exclusively “suits of a civil nature.” The Circuit Courts of the United States being purely statutory Courts, Congress had authority to limit their jurisdiction to only those cases it saw fit, those Courts only have jurisdiction of cases that are given to it by the Acts of Congress, to wit, “suits of a civil nature.” This being so, the Circuit Courts of the United States have no jurisdiction of cases removed from the State Court, where the suits are not of a civil nature, such as criminal cases or penal actions.

Your Petitioner further suggests to the Court that this is a penal action instituted under a Tennessee statute, to recover a penalty of \$100.00 per day for the violation of the statute, and is of a highly penal nature. This suit is not brought to recover damages as compensation for some wrong done Petitioner to

recompense him for losses or damages sustained. In that instance it would be incumbent upon Petitioner to show the amount of his damages, whereas, in this suit the question is whether or not the Defendant has been guilty of a violation of the statute, and he need not show that he has been damaged one cent in order to recover.

(2). And your Petitioner would further show to the Court that the petition for removal and the whole record in this cause do not show that this suit is brought in the district in which either the Plaintiff or the Defendant resides, and as a fact neither one resides within the district over which this Court has jurisdiction, as the Defendant is a non-resident corporation, and Petitioner now resides in Hamilton County, Tennessee, having moved there before this petition for removal was filed, but after the original summons was sued out in this case in the Circuit Court for Franklin County, State of Tennessee.

Your Petitioner further suggests to this Honorable Court that the second clause of the preceding or first section of said Act, hereinbefore quoted, restricts the jurisdiction conferred by the first clause of said preceding or first section of said Act; that the last part of said second clause of said preceding, or first section of said Act, which provides, "But when the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the Plaintiff or the Defendant," is by way of proviso to the preceding part of said second clause of said preceding or first section, which provides that "*no civil action shall be brought before either of said Courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;*" and further suggests that the words

“district of residence of” in view of the previous legislation on the subject is equivalent to “district whereof he is an inhabitant,” and that the effect is that where the jurisdiction is founded, or attempted to be founded, upon any of the causes mentioned in Section 1 of said Act, except the citizenship of the parties, it must be brought in the district of which the Defendant is an inhabitant, but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit must be brought in the district in which either the Plaintiff, or in the district in which the Defendant, resides, and cannot be construed as giving jurisdiction by reason of citizenship, to a Circuit Court held in a district of which neither party resides, but on the contrary, restricts the jurisdiction *to the district in which one of the parties resides within the State of which he is a citizen*, and that it confers no jurisdiction upon the Circuit Court of the United States of any suit brought before such Courts in a district of which neither party to such suit is an inhabitant and resident.

(3). And your Petitioner further suggests to this Honorable Court that the Defendant does not specifically pray for removal of this cause to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee. The Defendant’s prayer for removal is as follows:

“And your Petitioner therefore prays that said surety and bond may be accepted that this suit may be removed into the next Circuit Court of the United States to be had in the Middle Division of the Middle District of Tennessee, pursuant to the statutes of the United States in such cases made and provided, and that no further proceedings will be had herein in this suit, and it will ever pray.”

It will be observed that this prayer only asks the Court that “said surety and bond may be accepted, that the case may be

removed into the next Circuit Court of the United States to be had in the Middle Division of the Middle District of Tennessee." It only prays for two things, that the surety and the bond be accepted for removal, but it does not ask that the case be removed. Without a prayer for removal the Circuit Court of the United States would have no jurisdiction, and can acquire no jurisdiction to try the case.

Under the second ground of the motion to remand, to-wit: "Because the petition for removal and the record in this cause do not show that this suit is sought to be removed to the Circuit Court of the United States of the district in which either the Plaintiff or the Defendant resides," it will be seen that the Defendant, in his petition for removal, seeks to remove the cause to the wrong Court, and for this reason the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee can acquire no jurisdiction. The petition should have prayed for a removal to the District Court, where either the Plaintiff or the Defendant *resided*. This being so, the petition should have prayed for removal of the case to the Circuit Court of the United States for the Eastern District of Tennessee, as Petitioner resides in Hamilton County, Tennessee. It was incumbent upon the Defendant to investigate and ascertain where Petitioner, Gruetter, resided, and to have filed his petition for removal to the Circuit Court of the United States for that district.

And your Petitioner further suggests to this Honorable Court that the removal of said cause under the second clause of the

second section of said Act, under which it must be removed, as above suggested, depends on it being a suit of which said Circuit Court for the Middle Division of the Middle District of Tennessee, as one of the Circuit Courts of the United States, is given jurisdiction by the first section of said Act itself, and said Court not being given jurisdiction of said suits as that of Plaintiff, for the reasons aforesaid, said suit of Plaintiff does not come within the second clause of the second section of said Act, and cannot be, and was not, lawfully removed under said section, but, on the contrary, the same was unlawfully and improperly removed as aforesaid, and neither the said removal, nor said Act, confers upon said Court any lawful authority or power to retain said cause in said Circuit Court, or for said Circuit Court to assume jurisdiction of said cause so removed into the same, or to hold plea in the same, or do anything whatsoever in said cause, except to remand the same to said Circuit Court for Franklin County, State of Tennessee, in which it was brought and from which it was removed, which it has refused to do as aforesaid.

And your Petitioner further suggests to this Honorable Court, that said suit so commenced by him as aforesaid, was, until its said removal as aforesaid, wholly before and within the jurisdiction of said State Court in which it was commenced as aforesaid, a jurisdiction wholly independent of, and different from, that of said Circuit Court of the United States to which said suit was removed as aforesaid, and derived and proceeding from another and altogether different sovereign, and was, until said removal wholly from before, and wholly without, the jurisdiction of said Circuit Court of the United States to which it was removed, as aforesaid, and that the sole, only and first proceeding by which said suit was brought before the said Court as

aforesaid, and at all within its cognizance, was the means by which said removal was effected, as aforesaid, pursuant to said Act of Congress, and for that reason said proceeding for removal was, and is, an original proceeding to bring said suit before the said Circuit Court of the United States and within its cognizance, within the meaning of the second clause of the first section of said Act of Congress; that the last part of the second clause of the first section of said Act prohibits the bringing of any suit whatever "by any original process or proceeding" where the jurisdiction is founded only on the fact that the action is between citizens of different States, except only in the district of the residence of either the Plaintiff or the Defendant; that your Petitioner's suit is one where the jurisdiction is attempted to be founded only on the fact that the action is between citizens of different States, and the said petition for the removal of your Petitioner's suit, made as aforesaid, does not show on its face, or in any way whatever (or the record in this cause does not show in any manner) that this suit is brought in the district in which either the Plaintiff or the Defendant resides, or that either party is a resident or inhabitant of said Middle Division of the Middle District of Tennessee in which said Circuit Court of the United States before which said suit of your Petitioner was brought by said original proceeding of removal, is held, and that by reason thereof said removal as aforesaid is within said prohibition of said Statute and is improper, unlawful and in violation of said Act and laws of the United States in such cases made and provided, and said Circuit Court acquired, and could acquire, no jurisdiction whatever of, or over, said cause of your Petitioner by virtue of said suit being brought before it by such removal as aforesaid.

And your Petitioner further suggests to this Honorable

Court that if said suit had been brought by original process in said United States Circuit Court, to which it was removed, as aforesaid, the citizenship being the same, so that the complaint or appeal did not, and could not, show that either the Plaintiff or Defendant therein was a citizen of the State and an inhabitant or resident of the district or division of the district in which said Court was held, then upon proper objection made by the Defendant (to-wit: that, being Defendant, it was not subject to the jurisdiction of said Court on account of said prohibition of said Act, unless it voluntarily submit itself to its jurisdiction), the Court would refuse to entertain jurisdiction of said cause and dismiss the case, and if the Defendant voluntarily submitted itself to the jurisdiction of said Court instead of objecting to its jurisdiction, then both the Plaintiff (by bringing said suit in said Court), and the Defendant (by voluntarily appearing in said cause), would have submitted themselves voluntarily to the jurisdiction of said Court, and the Court would therefore have jurisdiction to proceed with the cause.

And your Petitioner further suggests to this Honorable Court that when the cause is brought in the first instance in a State Court, that said Act forbids the same being brought by the original proceeding of removal, before said Circuit Court of the United States, when it does not appear from the petition of removal that either the said Plaintiff or the said Defendant therein is an inhabitant or resident of the district or division of the district in which the said Circuit Court of the United States to which it is so removed is held, and the said Act, by further providing that the party removed shall give bond to pay costs, if said Circuit Court shall hold that said suit was wrongfully or improperly removed, and by providing that when-

ever said Court shall decide that said cause was improperly removed it shall remand the same to the State Court from whence it came, because of the prohibition of said second clause of said first section of said Act against the bringing of said suit, except as herein provided, before said Circuit Court of the United States, clearly gives the Plaintiff, in case of removal, the right to object to the jurisdiction of said Circuit Court to which said suit was removed, both on account of the wrongful and also of the improper removal of said suit; so that to give jurisdiction in case of such a wrongful or improper removal, not only must the Defendant submit himself to the jurisdiction of the Court to which he removes said suit, and thus waive his privilege to the prohibition of the Act aforesaid, but the Plaintiff must submit himself to said Court to which the removal is made (either expressly, or by failing to avail himself of the prohibition of the Act aforesaid by objecting in said Court to said removal as wrongful and improper, and move the Court to remand the case); hence your Petitioner suggests that in the bringing of this suit before the Court by the original proceeding of removal, as in case of bringing suit before the Court by original process, not only the party bringing the suit before the Court by removal (that is, the Defendant) must acquiesce in the jurisdiction of the Court to which removal is made over the said prohibition of said Act, but the Plaintiff must also acquiesce therein, and your Petitioner further suggests that he has not, as shown by the record in said cause in said Circuit Court of the United States to which said cause was removed, acquiesced, in any way, in the assumption of jurisdiction of said case by said Circuit Court of the United States to which said cause was removed as aforesaid, but, on the contrary, he has at all times objected to said Court retain-

ing said cause, or assuming jurisdiction thereof, by virtue of said removal, or otherwise, or of holding plea therein, or to its doing anything whatsoever in or about the same, except remand said cause to said State Court from which it came, as in such cases provided in said Act.

And your Petitioner further suggests to this Honorable Court that there is, and has been for a long time past, a great conflict of decisions among the Courts of the United States, over which this Honorable Court has supervisory jurisdiction, in respect to the question of removal to, and of the jurisdiction of, the Circuit Courts of the United States, which is now brought before this Honorable Court by this application; and it is for this reason (beside the wrong about to be done by the said Court of exercising jurisdiction in excess of that conferred by the laws of the United States, and violation of said laws, and to the wrong and injury of your Petitioner) the duty of your Petitioner to bring said matters involved in this application to the attention and before this Court, and that this Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your Petitioner further suggests to this Honorable Court that the decisions of the Courts of the United States, over which this Honorable Court has supervisory jurisdiction and control, upon and in respect to such removals as are brought before this Court by this application, and the jurisdiction of said Circuit Courts of the United States by virtue of such removals over the causes so removed, and over the Plaintiffs therein objecting to the jurisdiction, and the right of said Circuit Court to retain such removals against the timely objection of Plaintiffs therein, are, as your Petitioner is advised, in con-

flict with the decisions and utterances of this Court, so far as they have gone, in construing the first and second sections of said Act of Congress, and the prior similar Acts, and for this reason it is the duty, and it is right and proper, and your Petitioner ought to bring said matter involved in this application to the attention and before this Court, in order that the Honorable Court may do that which is right and proper and which ought to be done in the premises by reason thereof.

And your Petitioner further shows that all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, are recited and alleged as facts of which your Petitioner is advised appears from the record of said suit so brought by your Petitioner, and the proceedings in the State Court, and in said Circuit Court of the United States for the Middle Division of the Middle District of Tennessee to which said suit was removed as aforesaid, copies of all the proceedings in said case are hereinbefore set out verbatim, and includes the whole record and every step taken in said case, and for this reason Petitioner is advised that it is unnecessary to obtain a certified copy of the original record in this case, unless this Honorable Court should so desire.

And your Petitioner further suggests to this Honorable Court that, notwithstanding the premises, the said Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, by the overruling of said motion of your Petitioner to remand said suit to said State Court from which it was removed as aforesaid, has decided and determined to retain said cause in said Court, and to assume and exercise jurisdiction over the same by reason of it having been brought

before said Court by removal as aforesaid, and to hold plea therein, and that said Court will retain the same by reason of its decision and determination on said motion to remove, and is about to, and will, assume and exercise jurisdiction over the said suit so removed, and hold plea therein, and will assert and attempt to exercise jurisdiction over said suit so removed, and hold plea therein, all in excess of the jurisdiction conferred upon it by the said Act and the laws of the United States, and in contempt of said Act and the laws of the United States, and will compel your Petitioner either to abandon his said suit, or to submit himself to the jurisdiction of said Court in said suit, by virtue of said removal and the retention thereof in said Court, and the wrongful and unlawful assertion and exercise by said Court of jurisdiction as aforesaid, and your Petitioner is advised that the question involved in this application is, whether the said Circuit Court of the United States has jurisdiction at all of said suit so removed as aforesaid, under said petition of removal, and to retain the same in said Court, where your Petitioner has not waived his right to object to such wrongful and unlawful assertion and exercise of jurisdiction as said Court has, and is about, and will, exercise by reason of its retaining said cause in said Court and refusing to remand it as improperly and wrongfully removed and not within its jurisdiction; and your Petitioner is further advised that if he shall appear in said suit in said Court, or do any act or thing to recognize the right of said Court to take cognizance of said suit in said Court, and hold plea therein, he will thereby forfeit and waive his right thereafter to object to said removal of said suit so had as aforesaid, was, and is, wrongful and improper, and be precluded from afterwards asserting that exercise of jurisdiction which said Circuit Court has, and is about to, and

will, assert and exercise over said suit, was, and is, wrongful and unlawful and improper, and in excess of its jurisdiction given by said Act and the laws of the United States, and that your Petitioner has, and will have, no adequate remedy, or any remedy, against said unlawful and wrongful exercise of jurisdiction which said Court has, and is about to, and will, exercise as aforesaid, in retaining said suit in said Court and taking cognizance thereof, and holding plea therein, as aforesaid, for that Petitioner is without the right of effective appeal, notwithstanding the power of this Court to review cases involving jurisdiction by removal, for that Petitioner cannot appear in said cause, and invoke the processes of the Court (as he must do continually, being Plaintiff therein), and afterwards object to the jurisdiction thus from time to time invoked by him.

Therefore your Petitioner, the said J. W. Gruetter, the aid of this Honorable Court most respectfully requesting, prays that a writ of mandamus may issue to the said E. T. Sanford, Judge of the District Court of the United States for the Middle Division of the Middle District of Tennessee, holding the Circuit Court for the Middle Division of the Middle District of Tennessee, directing and commanding him to remand the said suit of *J. W. Gruetter, Plaintiff*, vs. *The Cumberland Telephone & Telegraph Company, Defendant*, to the Circuit Court of Franklin County, and State of Tennessee, from whence said suit was removed; or, on failure so to do, that he show cause to this Court, on a day to be named in said writ, why said cause should not be so remanded.

ARTHUR CROWNOVER,

ISAAC W. CRABTREE,

WILLIAM L. MYERS,

Of Counsel for Petitioner.

I have read the foregoing Petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

ARTHUR CROWNOVER,
Of Counsel for Petitioner.

STATE OF TENNESSEE, FRANKLIN COUNTY—SS.

Arthur Crownover, being duly sworn, on his oath states that he is agent and attorney of the Petitioner, J. W. Gruetter; that he was counsel for the Petitioner in charge, as his attorney, of the case of *J. W. Gruetter vs. The Cumberland Telephone & Telegraph Company*, referred to in the foregoing Petition, both in the Circuit Court of Franklin County, State of Tennessee, and in the Circuit Court of the United States for the Middle Division of the Middle Judicial District of Tennessee; that he has personal knowledge of the matters and things stated in the foregoing Petition; that the matters and things stated in the foregoing Petition are true, except insofar as they are stated on advice or information, and as to these affiant verily believes them to be true.

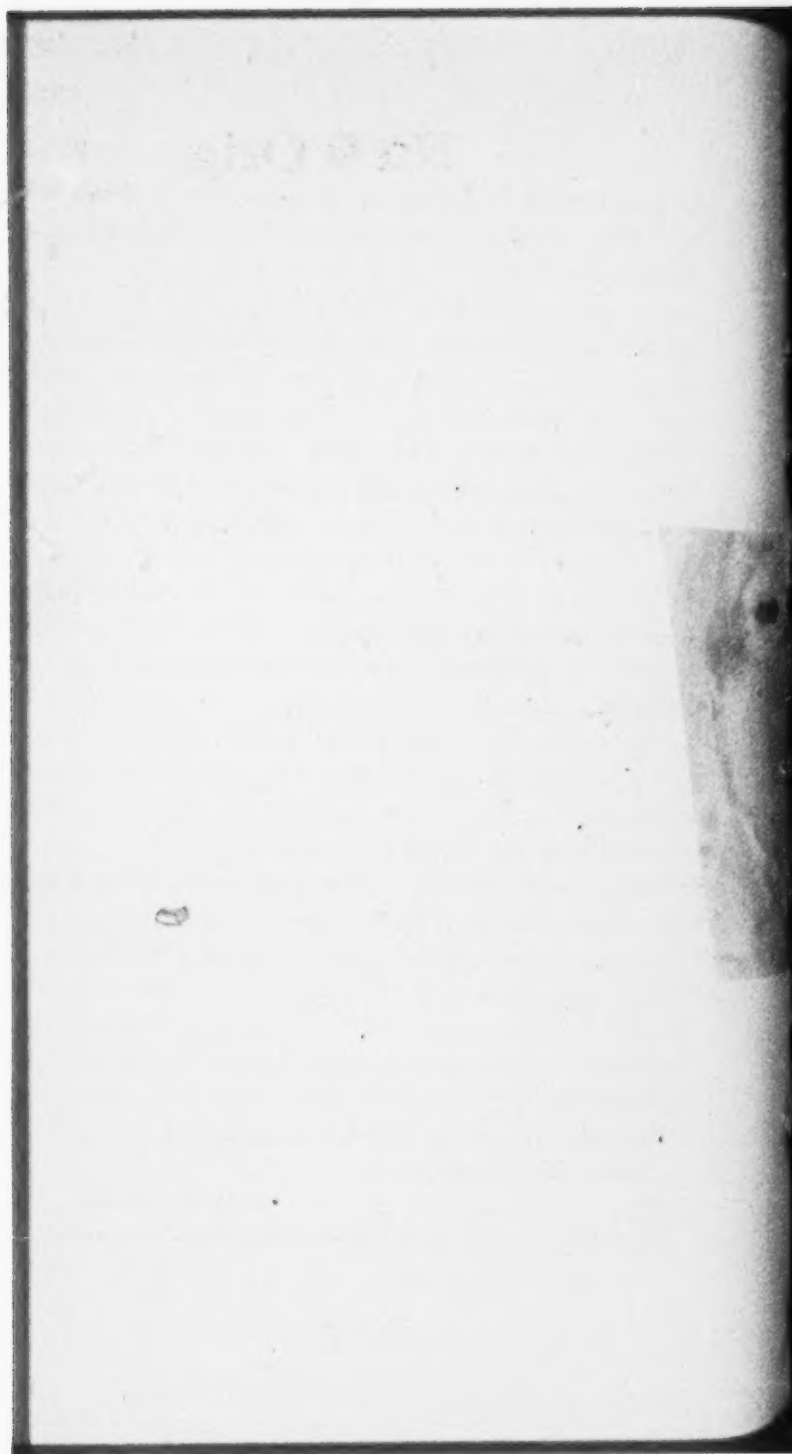
ARTHUR CROWNOVER.

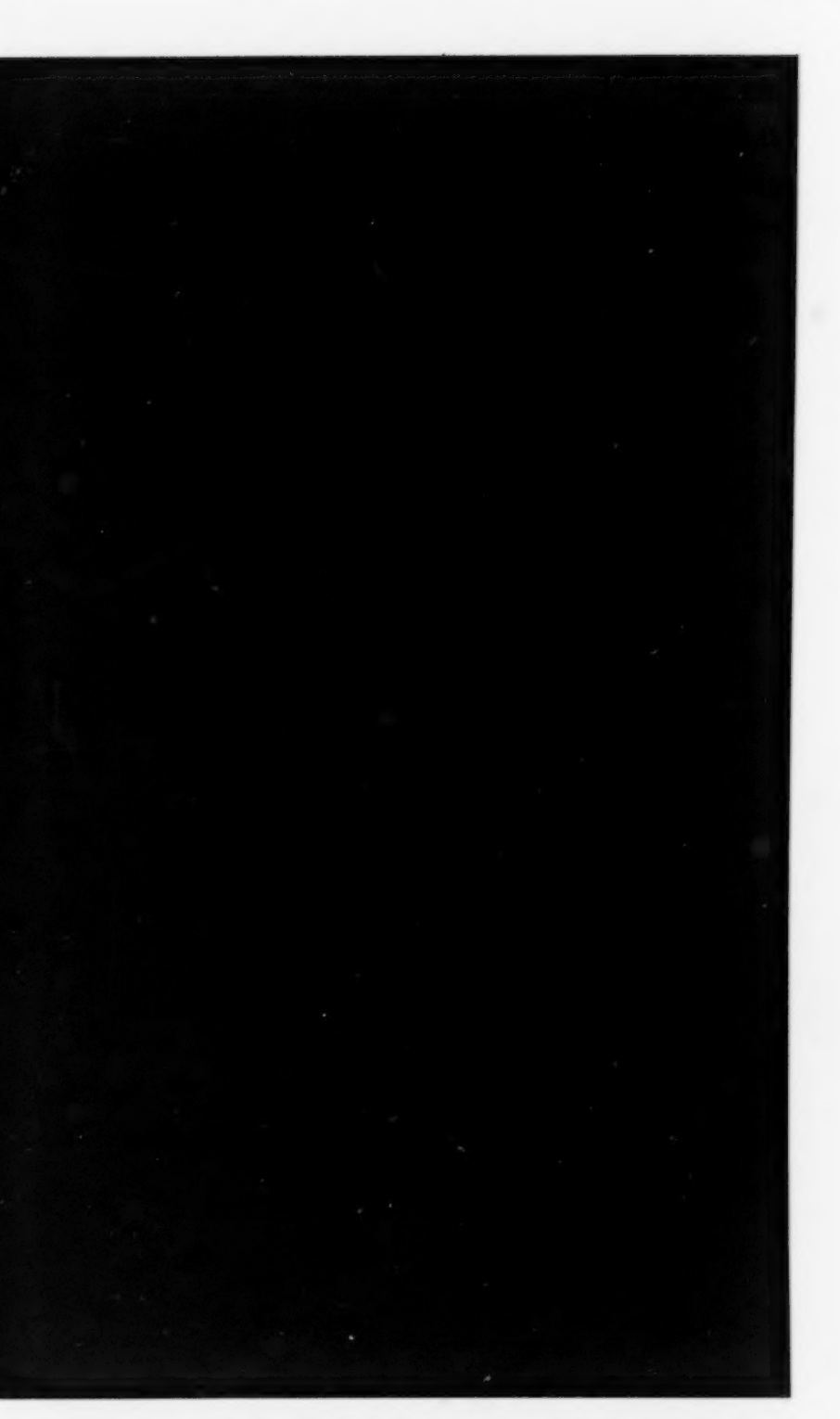
Subscribed and sworn to before me this, the 29th day of September, 1909.

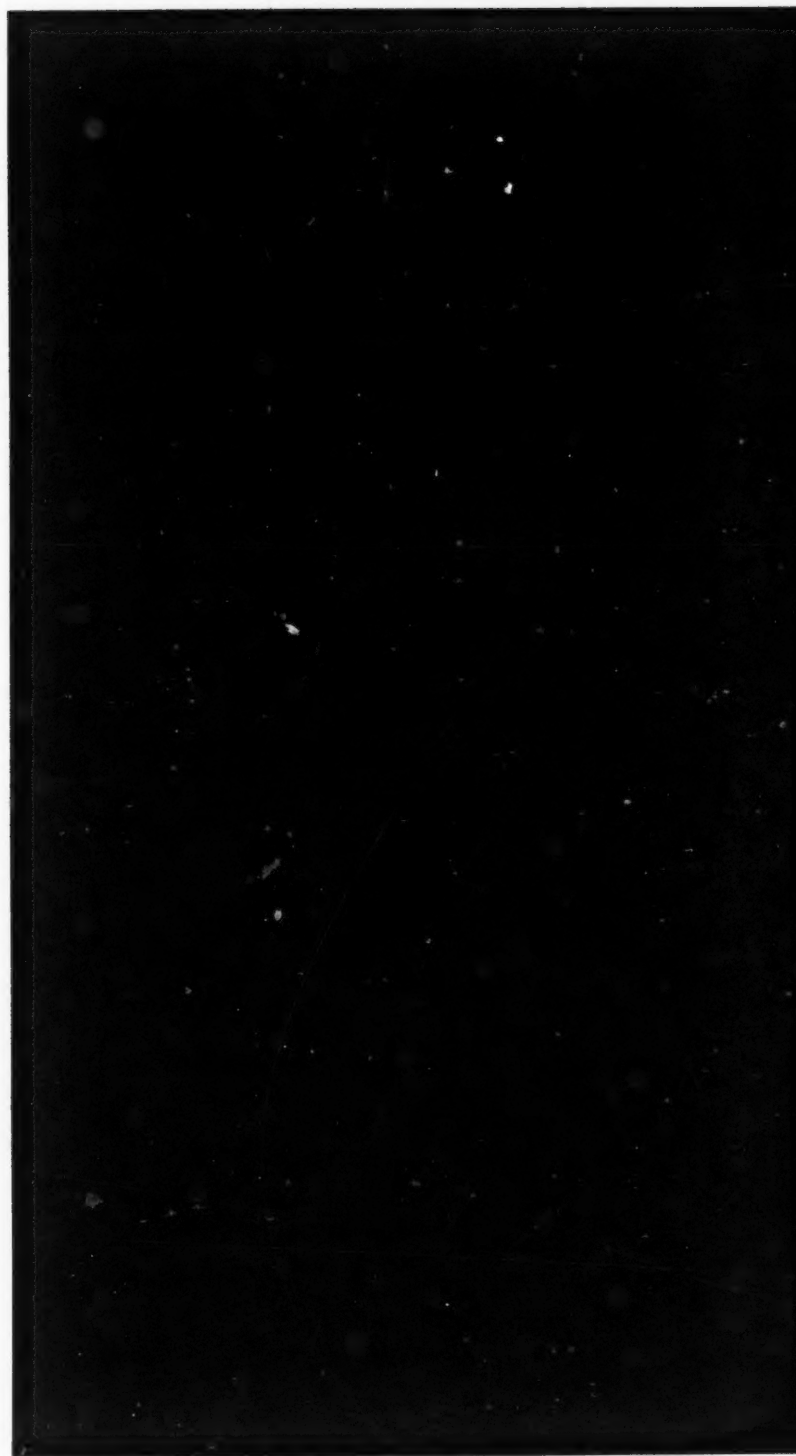
My term expires on the 13th day of April, 1911.

(*Notary Public Seal.*)

H. A. WALMSLEY,
Notary Public in and for the Above State and County.







Supreme Court of the United States.

J. W. GRUETTER

vs.

CUMBERLAND TELEPHONE AND
TELEGRAPH COMPANY.

ORIGINAL No. 3578.

BRIEF AND ARGUMENT FOR PETITIONER.

(Application for Mandamus)

May it Please the Court:

This is a penal action to recover twenty thousand dollars for a violation of Section 2 of Chapter 66 of the Acts of 1885, which is Shannon's Code of Tennessee, Section 1842, for the unjust discrimination by Defendant against Plaintiff, as set out in the declaration. Said Section 1842 is as follows:

"Every telephone company doing business within this State, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulation of the company; and no such company shall impose any condition or restriction upon any such appli-

cant that are not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of \$100.00 for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, a time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

The Defendant filed a petition to remove this case to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, to which the Plaintiff demurred, on the ground that it was an action to recover a penalty, and, therefore, was not removable. It was tried on demurrer before Circuit Judge M. M. Allison, who sustained the demurrer and dismissed the petition, and refused to remove the case. The Defendant obtained a certified copy of the record and filed the same in the Sixth Circuit Court of the United States; and the Plaintiff moved to remand the case for the following reasons:

1. Because it is a suit to recover a penalty, and the action is not of a civil nature.
2. Because the petition for removal and the record in this case do not show that this suit is sought to be removed to the Circuit Court of the United States for the district in which either the Plaintiff or Defendant resides.
3. Because the Defendant does not specifically pray for removal of this cause to the Circuit Court of the United States.

Said Circuit Court had jurisdiction to decide whether the case should be removed.

The Courts of the United States, in the most recent decisions, have held that when a petition for removal has been filed, if the petition sets out a good cause for removal and it is otherwise correctly drafted in form, etc., that of itself carries the case to the Federal Court; but the Lower Court has a right to look to the petition and ascertain for itself whether or not the petition is sufficient and states proper grounds for removal, and is otherwise regular. And if the petition does not state a sufficient ground for removal, or is not regular and valid, the State Court may pass upon the same and retain jurisdiction. However, the State Court can only determine questions of law on the face of the petition, and cannot raise questions of facts in passing upon which the suit should be removed.

See, 18 *Ency. Plead. & Pract.*, 338.

"A State Court is not bound to surrender its jurisdiction of a suit on the petition for removal until the case has been made which on its face shows that the petitioner has a right to the transfer.

"All issues of fact made on the petition for removal must be tried in the Circuit Court, but the State Court is at liberty to determine for itself, on the face of the record, whether a removal has been effected; and if it decides against the removal, its action will, after final judgment, be reviewable in this Court."

Stone vs. S. C., 117 U. S., 430 (29 L., 962);

18 *Ency. Plead. & Pract.*, 338;

Railroad vs. Hendricks, 88 Tenn., 710;

Williams vs. Atkins, 6 Cold., 615.

(1) This is not a suit of a civil nature.

The removal statute is the Acts of Congress, March 3, 1875, Chapter 137, Sections 1 and 2, as amended by the Acts of 1887,

Chapter 373, Section 1, and among other things provides: "That any suit of a *civil nature* at law or in equity, etc., between citizens of different States, where the amount involved exceeds the sum or value of \$2,000.00, exclusive of interest and costs," etc., may be removed upon petition.

It will be observed that this Act provides for removal of only "suits of a civil nature"—not those of a civil procedure. The procedure of the action has nothing to do with a right of removal.

"The term any suit of a civil nature does not include, but expressly excludes causes of a criminal or penal nature. The Courts of the United States do not enforce the criminal or penal laws of the States, any suits brought therein or removed thereto from the State Courts. Such suits are not removable."

Moon on Removal of Causes, Section 49.

The gist of the Statute is that the action must be of a civil nature, not a civil action or civil procedure, but the action must be of a *civil nature*. If this suit is one to recover a penalty, and is a penal action which does not seek to recover compensation for the party aggrieved, but simply seeks to recover the penalty which is provided to deter like offenders from doing other people likewise, and thereby injuring the people in general, then it is a penal action and is not removable.

See 18 *Ency. Plead. & Pract.* 169;
Indiana vs. Oil Co., 85 Fed. 873;
Texas vs. Day Land Co., 41 Fed. 230.

The trend of the cases seems to be that where the State Court holds that its Statute is penal, that is binding on Courts of other States as well as the Federal Courts.

See, Iowa vs. Railroad Co., 37 Fed., 497;
Huntington vs. Attrill, 146 U. S., 672;
Whitlow vs. R. R., 6 Cates, 344;
McCreary vs. First Nat. Bank, 1 Cates, 128.

The Supreme Court of the State of Tennessee said:

“A statute penalty is a penalty fixed by statute as a punishment for the violation of some provision of law.”

Woodard vs. Alston, 12. Heisk., 581-5.

Judge Lurton, in the case of *Cumberland Telephone & Telegraph Co. vs. Kelley*, 160 Fed., 316, in construing the statute upon which this suit is brought, stated that the action was *highly penal*. In fact, the Defendant in that case insisted, in its brief filed, that the action was highly penal and should be strictly construed.

It is an elementary principle of law which has been followed by all the Courts in construing penal statutes that:

“Whether a statute is to be considered remedial or penal depends upon the inquiry whether or not the party seeking to recover under it is required to prove that he has been *actually injured* by the defendant. If the party recovering is not obliged to prove this, the action is a penal one, whether brought by a common informer or *by a party who has been injured* by the breach of the statute. But if the plaintiff, to recover, must prove an injury to himself, the statute allowing the action is remedial, although it may give cumulative damages.”

1 *Cyc.*, 733; citing many authorities.

The difference between a penalty and a suit for damages is this, that in order to recover damages, either nominal, compensatory or punitive, *the party must show that he has been*

actually injured, while in order to recover a penalty the party has only to show that the statute has been violated by the defendant.

See, *Black on Interpretation of Laws*, Secs. 292 and 296.

Lawson on Contracts, in discussing liquidated damages and penalties, says the difference between the two is that where the contract provides that if it is not complied with by a certain date, that the party will pay a certain fixed sum for each day, week or month, he is in default as compensation to the party aggrieved, this is liquidated damages; while if the contract provides for a fixed sum to be paid on default which is in excess of the actual loss likely to be sustained in order to insure the performance of the contract, this is known as a penalty, and in this case the amount recoverable is limited to the loss actually sustained, regardless of the sum undertaken to be paid by the defaulter.

Lawson on Contracts, Sec. 465.

The Supreme Court of West Virginia, in the case of *Hall vs. Railroad*, 41 L. R. A., 669, in discussing this question, said:

"It does not make the statute any the less penal that the penalty is enforced by an action in any form civil. That matter relates only to the procedure. A penalty 'is in the nature of a punishment for the non-performance of an act or for the performance of an unlawful act. Involves the idea of punishment, whether (enforced) by a civil or criminal prosecution.' *Anderson's Law Dictionary*, 763; *Woolverton vs. Taylor*, 132 Ill., 197."

Endlich on Interpretations of Statutes, Section 331, says:

"It is immaterial, for the purpose of the application of the rule of strict construction, whether the proceeding pre-

scribed for the enforcement of the penal law be criminal or civil. Thus the act giving a party injured a civil action for the recovery of a penalty imposed upon a public officer for charging illegal fees is a penal act; so that the paying of excessive fees by a person after the expiration of his office for services done while in office is beyond the reach of the act."

Interstate Commerce Act against the unjust discrimination by common carriers in allowing rebates, etc., provides that where such a party has been discriminated against, the company is liable for all damages and reasonable attorney's fee, and its agents, employes and the common carrier are subject to a fine of \$5,000.00. A suit was brought under this statute by parties to recover for injuries sustained thereby, and the same was held to be a penal statute, and was subject to the statute of limitations of three years under the laws of Missouri.

See *Ratican vs. Terminal Company*, 114 Fed., 666;
Parsons vs. Railroad, 167 U. S., 455 (42 L., 234).

The Federal statute provides that national banks may charge the legal rate of interest in the State where the bank is located, and if such bank charges usury it will forfeit the entire interest, and if it has already been paid, the parties may recover back, in an action, twice the amount of interest thus paid. This statute has been declared to be penal, and a suit to recover the interest is a penal action.

McCreary vs. First Nat. Bank, 1 Cates, 132;
Barnet vs. Bank, 98 U. S., 555 (25 L., 212);
Blaine vs. Curtis, 59 Vermont, 120 (59 Am. Rep., 702).

In the case of *Lyman vs. Boston & A. R. Co.*, 70 Fed., 409, the Court held that a suit on the Massachusetts statute which

provided that in case of death resulting from negligence of a railroad corporation, or from the unfitness, gross negligence or carelessness of its servants or agents, the corporation should be punished by a fine of not less than \$500.00 nor more than \$5,000.00, to be recovered by indictment, and paid to the executor or administrator for the use of the widow, children or next of kin, was an action for a penalty, and was, therefore, not removable to the Federal Court. To the same extent see *N. H. vs. Railway*, 3 Fed., 887.

The case of *Huntington vs. Attrill*, 146 U. S., 657 (37 L., 1123), defines what is a penal law in the international sense, and not in the sense of a removal statute. The removal statute is entirely different from the principle laid down in the Antelope cases and in the case of *Huntington vs. Attrill*. The action may be penal in one sense, while it may not be penal in another. It depends upon the statute that is being construed and the principle involved.

In the cases above cited of *Lyman vs. Boston Railroad Co.* and *New Hampshire vs. Railway Co.*, it was held that those cases were penal within the removal statute because the statutes upon which the suits were instituted provided for a penalty and were not of a civil nature. The Courts, in those cases, in deciding that those actions were penal, were looking exclusively to the removal statute, and were not considering the question or the principle laid down in the Antelope cases and that involved in the case of *Huntington vs. Attrill*, to-wit: that the Courts of one State or nation will not enforce the penal laws of another State or nation. And this is thoroughly brought out by the decision of the Supreme Court of Tennessee in the case of *Whitlow vs. Railroad Company*, 6 Cates, 344, in which

that Court was passing upon a similar statute of Alabama, where it was sought to recover damages for the wrongful death that occurred on defendant's railroad in the State of Alabama. The action was based upon the statute of Alabama which provided for the recovery by the personal representative, and was the same in substance as the statutes in Massachusetts and New Hampshire above set out. The question raised in the latter case in Tennessee was that the Alabama statute provided for a penalty, and that the action sought to recover a penalty for the unlawful killing of the deceased, and the defendants sought to invoke the rule laid down in the *Antelope* cases and in the case of *Huntington vs. Attrill*, that the Courts of Tennessee would not enforce the penal statutes of Alabama. The Supreme Court of Tennessee held that the Alabama statute was not penal within that sense, which shows clearly that the Courts recognize the distinction in construing penal statutes with reference to the removal statute and the principle that the statute is penal in an international sense.

In the case of *Hamilton vs. Schlitz Brewing Company*, 100 Fed., 675, Judge Shiras held that "an action based on Code Iowa, Section 2423, which provides that all payments for intoxicating liquors sold in violation of that chapter shall be held to have been received in violation of law, and upon a valid promise to repay the same on demand, is one for the enforcement of a statutory penalty, which will not be entertained by a Court of the United States, and is, therefore, not removable."

See *Black's Dillon on Removal*, Sec. 24;
New Hampshire vs. Railway, 3 Fed., 887.

Justice Brewer, in an exhaustive opinion in the case of *Iowa vs. Railroad*, 37 Fed., 497, held that such statutes were penal,

and that cases of that kind cannot be removed to the Federal Court. He said:

“And there are actions in which the recovery is, by direction of the Legislature, increased above the actual compensation, and the increase is by way of penalty. Obviously, in all these there are elements of a civil as well as of a criminal nature. The case of *Harriman vs. Railroad Co.*, 57 Iowa, 187, is a good illustration. In that case the plaintiff had been overcharged, and brought his action against the company, under the statute, for five times the overcharge. The Court held that this was a penal action, and barred by the statute of limitations applicable thereto.”

“This, to our minds, shows very clearly that the essential objects of the provisions was not to afford the aggrieved individual an adequate remedy, but to protect the party by deterring railroads from committing a misdemeanor, which a violation of the Act was declared to be. The provision, then, is essentially criminal, rather than remedial. This is sufficient to enable us to determine to what the statute of limitations applies.”

Hence, we respectfully submit that His Honor, the Circuit Judge, was in error in holding said action to be civil instead of penal. There is no difference in effect between the case of *Lyman vs. Boston & A. R. Company*, *supra*, which holds that a corporation should be punished by a fine of not less than \$500.00 nor more than \$5,000.00, to be recovered by indictment, and paid to the personal representative for the use of the widow, children or next of kin, for the death resulting from negligence of the railroad, and the plain remedy where one may sue in an action of damages for the negligent killing of the deceased. In the case at bar the penalty or fine is put at \$100.00 per day for the violation of the statute. In the case

of *Lyman vs. Railroad, supra*, the fine is placed at not less than \$500.00 nor more than \$5,000.00. What is the difference between these two statutes in effect? They both provide penalties or fines for the violation of the statutes, and the recovery goes to the individual, and no part of it to the State. The procedure has nothing to do with the right of removal, that is, whether by indictment or by a straight action at law. This has been repeatedly held in the cases above cited.

“It is not the form, but the nature of the action which determines whether it is a civil suit within the meaning of the statute. A suit to recover a penalty for the violation of a statute, of a criminal nature, even when the remedy provided by the statute is a civil action, is not a suit of a civil nature.”

See, 18 *Ency. of Plead. & Pract.*, 169, and authorities cited.

The Defendant insists that the action is not penal, under the case of *Huntington vs. Attrill*, 146 U. S., 672, and insists that that statute defines what kind of a statute is penal. It will be observed by examining this case that the United States Supreme Court was construing a penal statute within the meaning of the international law, and the word “penal” there used means “criminal,” and arises under an entirely different law with respect to the enforcement of the same. That action arose, and the question there raised was as to a penal statute in the international sense.

The statute may be penal in the sense that it is not remedial and should be strictly construed. This is a well-settled elementary principle of law long recognized by all the Courts. And this shows that a statute may be penal in one sense and not

penal in another, and shows that an action may be civil and not penal, or may be penal and not civil.

Chief Justice Marshall laid down the rule in the *Antelope* cases "that the Courts of one State or nation would not enforce the penal statutes of another State or nation." By reading those cases and the cases cited by the Court in the case of *Huntington vs. Attrill*, such as the *Phoenix Insurance Co.* case, it will be seen that the Court meant criminal statutes. The penal statute, within the meaning of the removal statute, is not the same as a criminal statute, because the Courts uniformly use the expression that suits of a criminal or penal nature are not removable. It would be useless to use this expression if the word "criminal" includes the term "penal," or if the term "penal" includes the term "criminal."

It will be observed, in reading the opinion in the case of *Huntington vs. Attrill*, that the Court was of opinion that there are many statutes "of a penal nature" that are not penal within the international sense, thus showing that the Court recognized the distinction. If a statute is of a "penal nature," as stated by the Court in that opinion, then that is sufficient to prevent it from being removed. But the Court will see by examining the cases we have cited, especially *Black's Dillon on Removal of Causes*, as well as the *Ency. of Plead. & Pract.* 18 vol., p. 169, that if the statute is provided as a punishment to the offender, and not for compensation to the party aggrieved, then it is penal within the removal clause.

District Judge Oliver P. Shiras, who decided the case of *Hamilton vs. Schlitz Brewing Co.*, 100 Fed., 665, *supra*, was on the bench and decided this case eight years after *Huntington vs. Attrill* was decided, and it was evident that the Court recognized the distinction.

Justice Brewer, who decided the case of *Iowa vs. Chicago R. Co.*, 37 Fed., 497, in an exhaustive opinion concerning the penal statute, within the removal statute, was on the bench when the case of *Huntington vs. Attrill* was decided, and he, too, would have raised some question if the cases were not distinguishable.

Judge Baker, in the case of *Indiana vs. Alleghany Oil Co.*, 85 Fed., 873, made the distinction when he said that the penal statute was intended as punishment for the offender, and not as compensation to the aggrieved party.

The second question raised by counsel for the Defense below, that this was a suit between citizens of different States, and, under the United States Constitution, was removable, irrespective of the statute, is untenable, because it has been decided by the United States Supreme Court in several cases that the right of removal is a statutory right, and that when a State Court assumes jurisdiction the Federal Court will not interfere. What is meant by the United States Courts taking jurisdiction where the parties are citizens of different States is this: That the parties may sue in the first instance in the Federal Courts; but after the State Court has taken jurisdiction, then the Federal Court cannot supersede that Court except by an act of Congress, which act must be strictly complied with before the case can be removed.

"Causes can be removed from the State Court to the Circuit Courts of the United States in those cases, *and those only*, that are prescribed by the statutes of the United States. *No one has a constitutional right to remove a cause from a State Court*

to a Court of the United States. Congress may confer a right to remove such causes as it sees fit, within the limits to which the right of removal might be extended under the judicial power of the Constitution."

See *Moon on Removal of Causes*, Sec. 29, p. 31;
Little York Gold Washing & Water Co. vs. Keys,
96 U. S., 199 (24 L., 656);
Winnemans vs. Edgington, 27 Fed., 324, 326.

"A suit commenced in a State Court must remain there until cause is shown under some Act of Congress for its transfer."

Little York Gold Washing & Water Co. vs. Keys,
supra.

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the Court that it cannot proceed further with the cause. Having once acquired jurisdiction, the Court may proceed until it is judicially informed that its power over the case has been suspended."

Phoenix Ins. Co. vs. Pechner, 95 U. S., 183 (24 L., 427);
Babbitt vs. Clark, 103 U. S., 606 (26 L., 507);
Martin vs. Carter, 48 Fed., 596;
Gurnee vs. Brunswick, 11 Fed. Cas., 117; 1 Hughes,
207; 1 Va. Law J., 301;
Plaquemines Tropical Fruit Co. vs. Henderson, 170
U. S., 511 (42 L., 1126).

"It is argued for the defendant that the jurisdiction of the

Federal Courts in cases between citizens of different States arises under the Constitution of the United States, and the inference is drawn that the right of a non-resident to have his case tried by a Federal Court is a constitutional one, and that Congress, while it might regulate, could not altogether take it away. If the premises were sound, the conclusion would very likely follow; but they are involved in a mistake; it is true that the primary source of jurisdiction in these Courts is found in the Constitution, but it is directly conferred through the medium of Congress, by grant thereof, and is conferred with such limitations and exceptions as the Congress shall prescribe, when creating the Courts and defining their authority. Many cases in the Supreme Court have explained this, and the doctrine was restated by the Circuit Court in *Harrison vs. Hadley*, 2 Dill., 229; 11 Fed. Cas., 649. Congress may, therefore, grant or withhold altogether jurisdiction over removable cases. The jurisdiction which it has power to grant it has power to withdraw. If the right of removal was a vested right of property, quite different considerations would apply, but it is not so. It is simply a privilege of having the case tried in some other than the State tribunals. There is no property in it."

Manly vs. Olney, 32 Fed., 708.

"Circuit Courts do not derive their judicial power immediately from the Constitution, as appears with sufficient explicitness from the Constitution itself, as the first section of the Third Article provides that: 'The judicial power of the United States shall be vested in one Supreme Court and in such Inferior Courts as the Congress may from time to time ordain and establish.' Consequently the jurisdiction of the Circuit Court, in every case, must depend upon some Act of Congress.

As it is clear that Congress, inasmuch as it possesses the power to ordain and establish all Courts inferior to the Supreme Court, may also define their jurisdiction. Courts created by statute can have no jurisdiction in controversies between party and party but such as the statute confers."

Turner vs. Bank, 4 Dall., 8, 10 (1 L., 718, 719);

Sheldon vs. Sill, 8 How., 441, 448 (12 L., 1147, 1150);

McIntire vs. Wood, 7 Cranch, 504, 506 (3 L., 420, 421);

Kendall vs. U. S., 12 Pet., 524, 616 (9 L., 1181, 1217);

In re Wisner, 203 U. S., 449 (51 L., 264);

Stevenson vs. Fain, 195 U. S., 165 (49 L., 142).

"Congress, it may be conceded, may confer such jurisdiction upon the Circuit Courts as it may see fit, within the scope of the judicial power of the Constitution, not vested in the Circuit Court, but as such tribunals are neither created by the Constitution nor is their jurisdiction defined by that instrument, it follows that, inasmuch as they are created by an Act of Congress, it is necessary, in every attempt to define their power, to look to that source as the means of accomplishing that end. *Cary vs. Curtis*, 3 How., 236, 245 (11 L., 576, 581). Federal judicial power, beyond all doubt, is as it is ordained in the Constitution; but the organization of the system and the distribution of the subjects of jurisdiction among such Inferior Courts as Congress may from time to time ordain and establish, within the scope of the judicial power, always have been, and of right must be, the work of the Congress."

Grover & Baker Sewing Machine Co. vs. Florence Sewing Machine Co. ("The case of the sewing machine companies"), 18 Wall., 553 (21 L., 914).

It will be observed that the removal statute restricts the cases to those "*of a civil nature.*" This excludes all others, such as penal and criminal actions.

The Tennessee Supreme Court, at its December term, 1907, at Nashville, in the case of *State ex rel. vs. Long et al., School Commissioners*, held that a statute providing for separate white and colored public schools restricted the white schools to the Caucasian race and excluded Indians.

"There is a general rule of construction of statutes that if a portion of a number of classes are included by name, all others are excluded."

See *In re Kanaka Nian*, 6 Utah, 259;
People vs. Hall, 4 Cal., 399;
In re Gee Hop, 71 Fed., 275;
Matter of Takura Yamashita, 30 Wash., 234;
State vs. York District, 1 Bailey (S. C.), 215;
In re Ah Yup, 5 Savoy (U. S.), 155;
30 *Am. & Eng. Ency. Law* (2d Ed.), 517.

It necessarily follows that unless the term "action of a civil nature" includes suits of this kind, penal actions, then they are excluded by the restriction of the statute.

The Courts have held that "suits of a civil nature" did not include *mandamus* proceedings, *quo warranto* proceedings, *habeas corpus* proceedings, proceedings for injunction or prohibition, eminent domain proceedings, proceedings relating to taxation, proceedings for probate of wills and administrations, and many others that could be mentioned, because they are *not of a civil nature* within the meaning of the statute, and hence are not removable.

(2) The petition for removal and the record in this case do not show that this case is sought to be removed to the United States Court for the district in which either the Plaintiff or Defendant resides.

It is true that the declaration filed states, "The Plaintiff, J. W. Gruetter, a citizen of Franklin County, Tennessee, sues the Defendant," etc., but it *nowhere alleges the residence of Plaintiff*, nor indeed does the petition or the record anywhere show the residence of the Plaintiff, J. W. Gruetter.

We respectfully submit that the learned Judge erred in holding that the residence of the Plaintiff, J. W. Gruetter, was sufficiently set out in the record. He evidently had the terms "citizen" and "resident" confused.

This Honorable Court went thoroughly into this subject in the case of *Ex parte Wisner*, 203 U. S., 449 (51 L., 264), and held: "As it is the non-resident Defendant alone who is authorized to remove, the Circuit Court for the proper district is evidently the *Circuit Court of the district of the residence of the Plaintiff.*"

The jurisdiction of the United States Circuit Courts of suits involving controversies between citizens of different States, was (both at the time the suit involved in this application was brought in the State Court, and *when the removal was had*), and now is, derived from and dependent on, the Act of Congress, approved August 13, 1888, and in construing this Act this Court has held, and repeatedly affirmed, that the second clause of the first, or jurisdictional section of the Act which declares, "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court, and no civil suit shall be brought before either of said Courts against any person

by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought *only in the district of the residence* of either the Plaintiff or the Defendant," etc., restricts the general grant of original jurisdiction made in the first clause of that section, so that the effect is: "As to natural persons, therefore, it cannot be doubted that the effect of this Act read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase, 'district of the residence of' a person is equivalent to 'district whereof he is an inhabitant,' and cannot be construed as giving jurisdiction, by reason of citizenship to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, *restricts the jurisdiction to the district in which one of the parties resides within the State* of which he is a citizen; and that this Act, therefore, having taken away the alternative, permitted in the earlier Acts—of suing a person in the district 'in which he shall be found,' requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, *and in the district therein of which he is an inhabitant and resident.*" In other words, the general grant of original jurisdiction in the first clause does not include the grant of original jurisdiction of a suit, when the jurisdiction is sought to be founded only on the fact of the diverse citizenship of the parties to the suit, where it does not appear that one of the parties to the suit is a citizen of the State and an inhabitant and resident of the district in which the Circuit Court in which it is brought is held; that is, the first clause of the Act avers no original jurisdiction of the suit in the Circuit Court by reason of diverse citizenship, if neither Plaintiff or Defendant resides

in the district, although the parties may be citizens of different States.

See *Shaw vs. Quincy Mining Co.*, 145 U. S., 444, 448, 449;

McCormick vs. Walthers, 134 U. S., 43, 44;

Smith vs. Lyon, 133 U. S., 319;

St. Louis Ry. vs. McBride, 141 U. S., 128, 129;

Act August 13, 1888, 25 State at Large, 433.

The second section of the Act of August 13, 1888, was (when the suit was brought and removed), and still is, the law authorizing removals from the State Courts to the United States Circuit Courts, and under which the suit involved in this application was removed. This section, after providing in the first clause thereof for the removal of causes of a civil nature, in law and in equity, arising under the Constitution, or laws, or treaties of the United States, of which the United States Circuit Courts are by the first clause of the first section of the Act given original jurisdiction, then proceeds to provide for the removal of the remaining classes of cases of which those Courts are given original jurisdiction by the first section of the Act, including those where jurisdiction is founded only on diverse citizenship of the parties, as follows: "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section" (that is, by Section 1), "and which are now pending, or which may hereafter be brought in any State Court, may be removed into the Circuit Court of the United States for the proper district by the Defendant, or Defendants, therein, being non-residents of that State."

This Court has held, and declared it to be settled, that in order to make a suit removable under this section of the Act it

must be one which the Plaintiff could have brought originally in the United States Circuit Court, to which it would be removed by original process.

Traction Co. vs. Mining Co., 196 U. S., 245, 246;
Mexican Nat. R. R. vs. Davidson, 157 U. S., 208;
Cochran vs. Montgomery Co., 199 U. S., 272;
Tenn. vs. U. & P. Bank, 152 U. S., 454;
Metcalf vs. Watertown, 128 U. S., 586;
Minn. vs. Northern Securs. Co., 194 U. S., 48-63, 64;
Boston Mining Co. vs. Montana Ore Co., 188 U. S.,
640;
Cates vs. Allen, 149 U. S., 459, 460;
Sweeney vs. Castor Oil Co., Sup. Ct. Rep., Vol. 26,
No. 5, p. 55;
So. Pac. Co. vs. Denton, 146 U. S., 202;
Anderson vs. Watt, 138 U. S., 701, 702;
Neel vs. Penn. Co., 157 U. S., 153, 154;
Hanrick vs. Hanrick, 153 U. S., 198;
Powers vs. C. & O. Ry., 169 U. S., 99;
M. C. & L. M. Ry. vs. Swan, 111 U. S., 379.

The latest utterance of this Court on this subject is the *Cochran Case* (199 U. S., 260), where Your Honors say:

“The Act of 1887 restored the rule of 1789, and as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction.”

We have here not only a concise and emphatic declaration of the rule by this Court in that case, but also an interpretation of its former opinions. It is well to note that the case of *Rome vs. Hughes*, 130 Federal, 585, is founded on a construction of the previous opinions of this Court, which construction is seemingly repudiated in the *Cochran Case*, *supra*.

Again the Court says in the *Cochran Case*:

"To hold otherwise brings the language of the clause into conflict with the rule that a suit, to be removable, must be within the original jurisdiction of the Circuit Court, departs from the settled former construction, and ignores the main purpose of the Act of 1887, which was to restrict the jurisdiction of the Circuit Court."

And again this Court says in the *Cochran Case*:

"The main purpose of the Act of 1887 was, as has been repeatedly held, to restrict the jurisdiction; and this was largely accomplished in the matter of removals by withholding the right from Plaintiffs, and only according it to Defendants when sued in Plaintiff's district. * * * It (the suit) could not have been brought in the Middle District of Alabama; and this being so, the case was improperly removed, and should be remanded."

In *Mexican National R. R. vs. Davidson*, 157 U. S., 201, this Court, through Chief Justice Fuller, says:

"We must hold, therefore, as has indeed already been ruled in *Tennessee vs. Bank*, 152 U. S., 454, 461, that the jurisdiction of the Circuit Courts on removal by the Defendant, under this section, is limited to such suits as might have been brought in that Court by the Plaintiff under the first section."

In *Tennessee vs. Bank*, 152 U. S., 454, 461, Mr. Justice Gray says:

"Section 2 allows removals from a State Court to be made only by Defendants, and of suits of which the Circuit Courts of the United States are given jurisdiction by the preceding section; thus limiting the jurisdiction of a Cir-

cuit Court of the United States on removal to such suits as might have been brought in that Court by the Plaintiff under the first section. The change is in accordance with the general policy of these Acts, manifest upon their face, and often recognized by this Court, to contract the jurisdiction of the Circuit Courts of the United States.”

We have purposely omitted any discussion or extended citation of cases decided by any other Court, believing that all the light needed is found in the previous utterances of this Court. But the confusion resulting from the contrariety of opinion existing in the Circuit Courts and the several Courts of Appeal are clearly indicated by the two cases, *Rome vs. Hughes*, 130 Fed., 585, and *Foulk vs. Gray*, 120 Fed., 156. The opinion in the latter case cites nearly if not all of the pertinent cases, and we beg Your Honor’s careful consideration of the seemingly unanswerable reasoning employed by Judge Keller in that case.

The right given to the non-resident Defendant, or Defendants, by the second clause of Section 2 of said Act, to remove the cause from the State Court to a United States Circuit Court is not absolute; it is subject to the other limitations of that clause—i. e., that it must be a suit within the jurisdiction of the United States Circuit Court, and that it must be removed to the proper district, and, therefore, it does not authorize him or them to remove it to a United States Circuit Court held in a district wherein the United States Court has no jurisdiction of the suit removed, or to any other judicial district beyond the State, or part of the State, which constitutes the district in which the suit is pending.

The proceeding of removal is an original indirect proceeding, whereby the suit is removed (where the removal is rightfully and

lawfully made) from wholly within the jurisdiction of the State Court to wholly within the jurisdiction of the United States Circuit Court to which it is so rightfully and lawfully removed. The Plaintiff has not and does not appeal to the jurisdiction of any United States Circuit Court, nor has he brought his suit in a district wherein the Defendant cannot be sued within the meaning of the removal act. He has not invoked the jurisdiction of the United States Court; he has not consented to the exercise of jurisdiction by that Court over his person; nor has he waived his right to object to the exercise of jurisdiction over him, since he only does this when he submits himself to the jurisdiction of the United States Circuit Court by bringing his suit originally therein, or by appearing and in some way invoking the process of or consenting to the exercise of jurisdiction of that Court.

In the removal proceedings under consideration, the Defendant is the actor, seeking to avail himself of a right given him, or which he supposes is given him by the statute, and consequently no question of waiver of the right to be sued in a particular district arises, except that the Defendant by his own act, in bringing the suit by removal before the United States Circuit Court, estops himself, and himself only, from afterwards asserting the want of jurisdiction of the Court of the suit.

The Plaintiff, not having submitted himself to the jurisdiction of the Circuit Court to which the case has been removed (either by bringing his suit therein or by afterwards, by any act of his, waiving the want of jurisdiction of the Court in any way), is at full liberty to object to the total want of jurisdiction of the United States Circuit Court of the cause after its removal, and to insist on the same.

(a) The proceeding of removal is an ORIGINAL but in-

direct proceeding by which the United States Circuit Courts acquire original jurisdiction of a cause.

"Original" means "pertaining to the beginning or origin, the first or primitive form of a thing."

Com. vs. Schollinberger, 156 Pa. St., 213;

Haley vs. State, 42 Neb., 561.

"Original," the first in order of time, primary.

Anderson's Law Dictionary, p. 739, "Original."

"Original" is from "origo."

Ibid, Note 2.

"Original."—"Primitive; first in order, bearing its own authority, and not deriving authority from an outside source, as original jurisdiction, original writ," etc.

Black's Law Dictionary, p. 857.

"Original" proceeding is defined thus: A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right.

Rich vs. Husson, 1 Duer, 620.

The removal is only an indirect mode by which the Federal Court acquires original jurisdiction.

Virginia vs. Rives, 100 U. S., 337;

Ry. Co. vs. Whitton, 13 Wall., 287.

(b) The proceeding for removal, as has been pointed out above, is an original indirect proceeding by which the suit was brought before the United States Circuit Court. By this proceeding on the part of the Defendant the cause was taken from wholly within the jurisdiction of the State Court (a jurisdiction

exercised under and derived from a wholly different sovereign, from that under and from which the United States Circuit Courts derive their jurisdiction), and was attempted to be brought wholly within the jurisdiction of the United States Circuit Court. If it got within the jurisdiction of the United States Circuit Court for any purpose, therefore, Defendant was the actor, or instrument, by which it was done.

The Defendant having himself brought the case before a Federal Court, where he was not liable to be sued, does not raise a question of waiver of his own right, but, as to himself, he simply submits himself thereby to the jurisdiction of such Court and estops himself from afterwards contesting its jurisdiction. As to the Plaintiff, the Defendant merely brings him into a Court which has no jurisdiction of the cause, because the case is not removable under the second section of the Act, inasmuch as the jurisdiction being wholly dependent on diverse citizenship, it affirmatively appears, from the petition of removal and the record, that neither party to the suit is a citizen of the State or an inhabitant or resident of the district in which the Circuit Court to which it is removed is held. While it is true that the Defendant in doing this has waived his right of not being sued in that Court, yet that does not arise from the act of the Plaintiff in suing him in a district where he was not liable to be sued (for he was liable to suit in the State Court), but arises from his own voluntary act, and choice of that tribunal, and the exercise by Defendant of such right in no way estops the Plaintiff (who has not submitted himself in any way to the jurisdiction of the Court) from urging his, the Plaintiff's, right to object to being sued, for the want of jurisdiction, in the Federal Court: (1) Because the suit was not removable under the Act, and (2) be-

cause that diverse citizenship is not shown which gives the Court jurisdiction of the cause.

The removal act itself gives him the right to move to remand, and what is still more convincing it further makes it the duty of the Circuit Court to remand the cause.

(c) Neither the right given the Defendant to remove the cause in the second clause of the second section of the Act, nor the requirement to remove it "into the Circuit Court to be held in the district where such suit is pending," is an absolute right, but is a right given solely where the other conditions of the second clause can be and are fully complied with.

In the first place, by the said second clause it must be a suit of which the Circuit Court to which it is removed has jurisdiction under the first section of the Act (that is, under the first clause as restricted by the second clause of said section); and as appears above, such is not the case in regard to the suit involved in this application.

In the next place, clause 2 of section 2 gives the right to remove only into a Court of the "proper district." As shown above, this Court has held, and repeatedly affirmed the holding, that, as to natural persons, where the jurisdiction is sought to be founded only on the fact that the parties are citizens of different States, as in the case involved in these applications, the Act requires the suit to be brought in the State of which one of the parties is a citizen, and in the district therein of which he is an inhabitant and resident, and the Act is not to be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court, held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen.

This Court has repeatedly decided that the only districts in which a Defendant can be sued under the Act of 1888 is that of the *residence of the Plaintiff, and that of the residence of the Defendant*;

Smith vs. Lyon, 133 U. S., loc. cit., 319;

McCormick vs. Walthers, 134 U. S., loc. cit., 44;

Mex. Nat'l Bank vs. Davidson, 157 U. S., loc. cit., 208;

Shaw vs. Quincy Mining Co., 145 U. S., loc. cit., 448, 449,

and such district is, therefore, the only "proper district," within the meaning of the first section of the Act. "Proper district" within the meaning of the second clause of the second section means either of the districts (*i. e.*, one of the districts) made "proper districts" by the first section of the Act. Hence when the third section requires the petition to be "for the removal of such suit into the Circuit Court to be held in the district where such suit is pending," it contemplates that the suit shall be pending in a "proper district," in which case only can it be removed as directed in the third section.

Otherwise interpreted the Act would authorize a removal into a Court having no power to take cognizance of it as a removed cause, and whose duty it would be under the Act to remand it again to the State Court, and it cannot be reasonably supposed Congress ever intended such a useless and absurd proceeding.

(d) In bringing his suit Plaintiff did not seek the Federal jurisdiction at all; he did not bring it in any Federal Court; he did not bring it in the Federal Court of any district; but brought in the State Court in a jurisdiction wholly without that of the Federal Courts, and wholly within that of another and different

sovereign. He did not, therefore, bring his suit in a district of Federal jurisdiction within which the Defendant was not liable to be sued, and hence, in bringing his suit he did not produce that situation where he had submitted himself to the jurisdiction of a Court where he could not sue the Defendant, and had brought the Defendant into that Court to answer, although Defendant when so brought in could, by objecting, oust the jurisdiction of the Court, or where if he preferred (as his exemption from liability to be sued in that Court was in the nature of a privilege which he could waive), he might, when so called on by Plaintiff to answer in such Court, waive his privilege, and thus submit himself to the jurisdiction of the Court, and thus give it jurisdiction of the cause. Such a situation can only arise where Plaintiff sues originally in the Federal Court, and thus calls on Defendant either to object to the jurisdiction or to waive the privilege he has of not being sued in that Court and submitting to its jurisdiction. For this reason it does not fall within the principle of the cases which apply when the question of waiver is raised by suit being brought originally in the Federal Court.

Central Trust Co. vs. McGeorge, 151 U. S. (loc. cit.),
134;

Shaw vs. Mining Co., 145 U. S., 453.

Although the suit was not removable under the second section of the Act, and, for that reason, the Circuit Court to which it was removed acquired no jurisdiction of it through the removal, yet, as this want of jurisdiction arose, not from something absolutely essential to vest jurisdiction, but from something in the nature of a personal privilege of the party against whom jurisdiction is being asserted, it can be waived.

If waived, as the Court has general jurisdiction otherwise of the suit, the jurisdiction of the Court would become complete

and attach independent of the removal, but solely because the waiver brought the cause within the jurisdiction of the Court.

Such waiver may be effected in such a contingency, by either a general appearance, or any imparlance, answer, plea, or other act whatsoever, which recognizes that jurisdiction of the cause exists in the Court.

If, therefore, after removal, the Plaintiff in the case involved in this application, shall appear in the case, or recognize jurisdiction as existing in the Court over the cause, in any of the ways mentioned above, the Court will acquire jurisdiction of the cause by reason of its general jurisdiction, thereby being completed and attaching, although he may have previously properly protested against the exercise of jurisdiction; and he will thenceforth be estopped, both in that Court and on error or appeal, from raising the question of the primary jurisdiction of the Court of the case, either on the ground of the unlawful and wrongful removal, or any other ground whatever.

Central Trust Co. vs. McGeorge, 151 U. S., 134, 135;

St. Louis Ry. vs. McBride, 141 U. S., 131;

Wabash Ry. vs. Brow, 164 U. S., 280;

In re Cooper, 143 U. S., 473;

Interior Const. Co. vs. Gibney, 160 U. S., 219, 220;

Texas & P. Ry. vs. Saunders, 151 U. S., 109;

Martin vs. B. & O. R. R., 151 U. S., 688;

French vs. Hay, 22 Wall., 238;

Pollard vs. Dwight, 4 Cranch, 421;

So. Pac. Co. vs. Denton, 146 U. S., 205, 206;

Bacon's Abridgment, Vol. 8 (*Prohibition K.*), citing 2
Mod., 271, 272;

Welthosen vs. Ormsley, 3 Durnf. & East, 316.

From the above it will be seen that a petition for removal and the record should show the residence and citizenship of the

parties with the same degree of certainty that a bill or declaration in the Circuit Court of the United States should do in the first instance, and it has been repeatedly held by the Federal Courts that an allegation of residence without an allegation of citizenship in a bill is insufficient. Mr. Foster in his Federal Practice states:

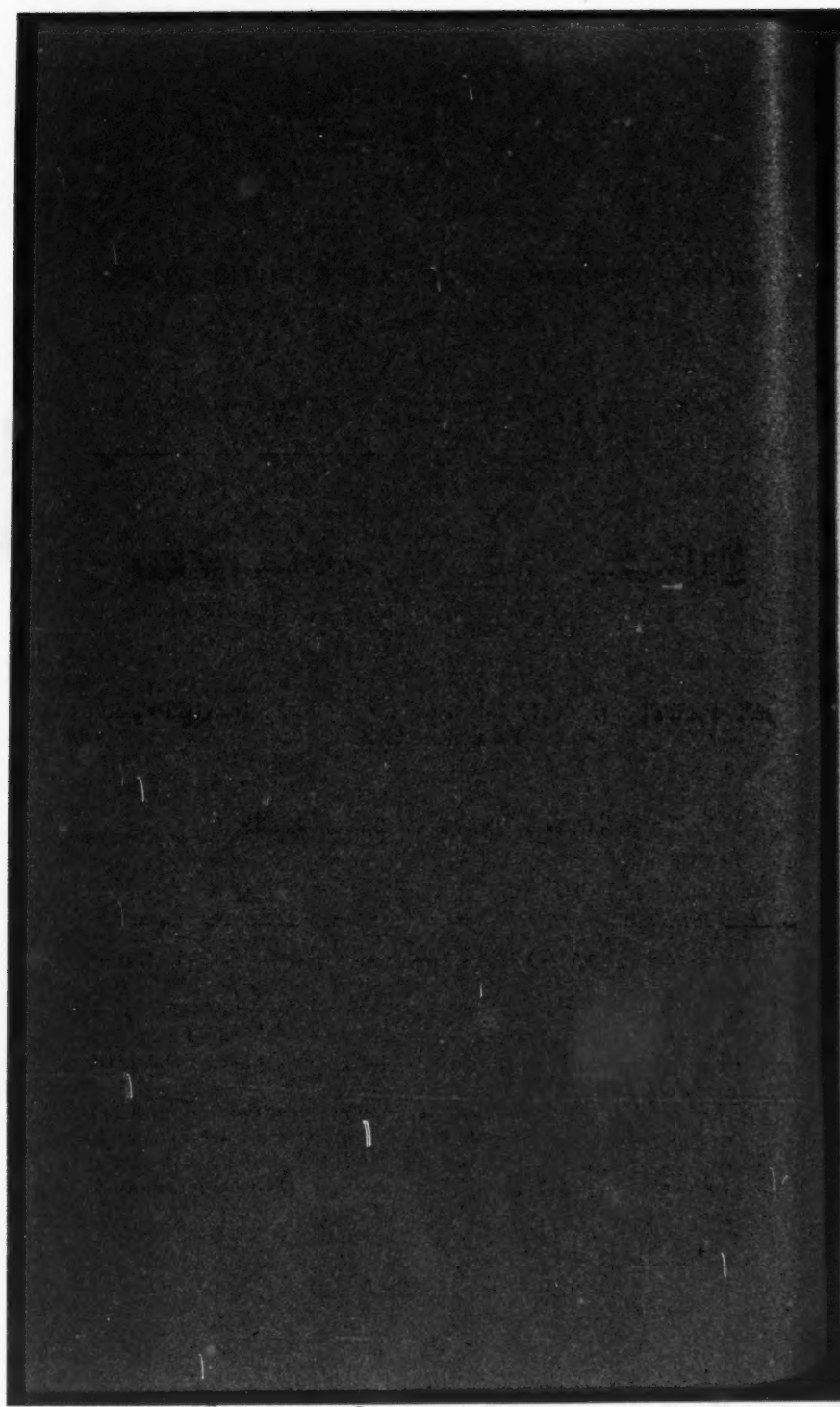
“An allegation of residence without an allegation of citizenship is insufficient. If one of the parties is a corporation, the bill must state by or under the laws of what State it was created, and its members will then be conclusively presumed to be citizens of that State. * * * Where as bill or a common law pleading is filed or served subsequent to the commencement of the suit, it should aver the citizenship of the parties **AT THE TIME THE SUIT WAS COMMENCED AS WELL AS IN THE PRESENT TENSE.**”

See *Foster's Federal Pract.* (3d Ed.), Sec. 66, p. 193;
Tug River C. & S. Co. vs. Brigel, 67 Fed., 625;
Robertson vs. Cease, 97 U. S., 646;
Pacific Postal Telegraph Co. vs. Arvine, 49 Fed., 113;
Lackey vs. Newton Min. Co., 56 Fed., 628;
22 Ency. of Plead. & Pract., 262 and 267.

This question was thoroughly gone over in the very able brief of the eminent counsel in the case of *Ex parte Wisner*, above cited, and this Court held in that case that the remedy where the United States Circuit Court wrongfully took jurisdiction was by petition for writ of mandamus.

All of which is respectfully submitted,

ARTHUR CROWNOVER,
ISAAC W. CRABTREE,
WILLIAM L. MYERS,
Counsel for Petitioner.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

EX PARTE J. W. GRUETTER. ORIGINAL PROCEEDING NO. 9.

The answer of Edward T. Sanford, judge of the District Court of the United States for the Middle District of Tennessee, to the rule upon him to show cause why a writ of mandamus should not issue commanding him in said court to remand to the Circuit Court of Franklin County and State of Tennessee the suit of J. W. Gruetter, plaintiff, against Cumberland Telephone and Telegraph Company, defendant.

Respondent respectfully answers and certifies to the honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner in said petition has correctly set out the matters appearing of record in the proceedings in the aforesaid suit of J. W. Gruetter, plaintiff, against the Cumberland Telephone and Telegraph Company.

Respondent overruled the motion of plaintiff to remand the aforesaid cause, for the reason that in respondent's opinion the several grounds of the petitioner's motion to remand said cause to the Circuit Court of Franklin County, Tennessee, were not well founded in law, and that under the facts and pleadings presented by the record the Circuit Court of the United States for the Middle District of Tennessee, sitting at Nashville, had jurisdiction of said cause.

Respondent's reasons for declining to remand said cause to the Circuit Court of Franklin County, Tennessee, are indicated in a memorandum opinion filed in said cause and made a part of the petition in this proceeding.

Subsequent to the filing of said memorandum opinion, and before respondent had been advised of the filing of this petition, and on, to wit, September 23, 1909, an order was entered in said cause, in accordance with said opinion, overruling petitioner's motion to remand.

Respondent respectfully submits to the judgment of this honorable court the questions presented by the record and will enforce, by order, any direction given by the court in the premises.

EDWARD T. SANFORD,
*Judge of the District Court of the United States
for the Middle District of Tennessee.*

(Indorsement:) Supreme Court U. S. October term, 1909. Term No. 9, Original. Ex parte: In the matter of J. W. Gruetter, petitioner. Return to rule to show cause. Filed October 25, 1909.



IN THE
Supreme Court of the United States

EX PARTE J. W. GRUETTER.

ORIGINAL PROCEEDING No. 9.

October Term, 1909.

The answer of Edward T. Sanford, Judge of the District Court of the United States for the Middle District of Tennessee, to the rule upon him to show cause why a writ of mandamus should not issue commanding him in said Court to remand to the Circuit Court of Franklin County and State of Tennessee the suit of J. W. Gruetter, plaintiff, against Cumberland Telephone & Telegraph Company, defendant.

Respondent respectfully answers and certifies to the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner in said petition has correctly set out the matters appearing of record in the proceedings in the aforesaid suit of J. W. Gruetter, plaintiff, against the Cumberland Telephone & Telegraph Company.

Respondent overruled the motion of plaintiff to remand the aforesaid cause, for the reason that in respondent's opinion the several grounds of the petitioner's motion to remand said cause to the Circuit Court of Franklin County, Tennessee, were

not well founded in law, and that under the facts and pleadings presented by the record the Circuit Court of the United States for the Middle District of Tennessee, sitting at Nashville, had jurisdiction of said cause.

Respondent's reasons for declining to remand said cause to the Circuit Court of Franklin County, Tennessee, are indicated in a memorandum opinion filed in said cause and made a part of the petition in this proceeding.

Subsequent to the filing of said memorandum opinion, and before respondent had been advised of the filing of this petition, and on, to wit, September 23, 1909, an order was entered in said cause, in accordance with said opinion, overruling petitioner's motion to remand.

Respondent respectfully submits to the judgment of this Honorable Court the questions presented by the record and will enforce, by order, any direction given by the Court in the premises.

EDWARD T. SANFORD,

*Judge of the District Court of the United States
for the Middle District of Tennessee.*

IN THE
Supreme Court of the United States

EX PARTE J. W. GRUETTER.

ORIGINAL PROCEEDING No. 9.

October Term, 1909.

**BRIEF IN SUPPORT OF RETURN TO PETITION
FOR WRIT OF MANDAMUS.**

*To the Honorable the Chief Justice, and Associate Justices, of the
Supreme Court of the United States:*

J. W. Gruetter instituted a suit in the Circuit Court of Franklin County, Tennessee, to recover penalties amounting to \$20,000.00 against the defendant, the Cumberland Telephone & Telegraph Company. There are but two questions which need be considered:

FIRST: Is this a suit of a civil nature within the meaning of the removal statutes of the Congress?

SECOND: Does the record sufficiently show the jurisdictional facts which entitle the United States Circuit Court to take and maintain jurisdiction?

There is no controversy as to there being a diversity of citizenship; the defendant is a corporation of Kentucky, and the plaintiff is a citizen of Tennessee. The only question is whether the record sufficiently shows that the plaintiff is a *resident* of this particular District in Tennessee.

It is, of course, well settled that the entire record may be looked to in determining this jurisdictional question.

The suit was instituted by summons in the Circuit Court of Franklin County, Tennessee, on November 27th, 1908, which was executed on the defendant on December 3rd; thereafter, on December 17th, the plaintiff filed his declaration in which he averred: that the plaintiff, J. W. Gruetter, was a citizen of Franklin County, Tennessee; that on February 15th, 1908, the defendant agreed to place a telephone in plaintiff's *dwelling house* and give him telephone connection and facilities at his *place of residence* in Sewanee, Tennessee, and afterwards, on April 10th, 1908, the defendant accepted from plaintiff a written order to put in said telephone, but that the defendant failed to give the plaintiff telephone connection and facilities at his said *place of residence*, and that defendant failed to furnish said telephone connection and facilities, as above set out, from the 15th day of February, 1908, to and including the 26th day of November, 1908.

From all of this it is manifest that the plaintiff was a citizen and resident of Franklin County at the time he ordered a telephone in his place of residence at Sewanee, Tennessee, on February 15th, 1908; that he continued to be a citizen and resident of Sewanee, Tennessee, up to and including November 26th, 1908; that his suit was instituted on November 27th, 1908, and on December 5th, when he filed his declaration, he averred that he was a citizen of Franklin County, Tennessee, and on the same day the petition for removal was filed in the Circuit Court of Franklin County to remove said cause to the United States Circuit Court.

Thereafter on December 18th, the plaintiff demurred to the defendant's petition for removal, and this demurrer was sustained by the Judge of the Circuit Court of Franklin County; the only question being raised, or decided, was as to whether the suit was of a civil nature.

It, therefore, appears from the record that the plaintiff was a citizen and resident of Franklin County, Tennessee, residing at Sewanee, in said county, and therefore, all proper jurisdictional facts as to citizenship appear in the record.

The real controversy in this case turns upon the question as to whether this is a suit of a civil nature within the meaning of the removal act of the Congress. The question is so well discussed by his honor, Judge Sanford, in the memorandum opinion in the record, that it is deemed unnecessary to present the matter again in this brief.

It is respectfully submitted that the Circuit Court of the United States had, and has, jurisdiction, and that the action of the Court in overruling the motion of the plaintiff to remand the cause to the State Court was proper, and that the plaintiff's petition should be dismissed.

Respectfully submitted,

WILLIAM L. GRANBERY,
Counsel.

EX PARTE: MATTER OF GRUETTER,
PETITIONER.

MANDAMUS.

No. 9, Original. Submitted April 11, 1910.—Decided May 31, 1910.

Where the Circuit Court has jurisdiction to determine questions presented on a motion to remand a case to the state court and denies the motion mandamus will not lie to compel it to remand the case. *In re Pollitz*, 206 U. S. 323.

In this case diverse citizenship existed but plaintiff moved to remand because the suit was not of a civil nature but for a penalty, because the record did not show that plaintiff or defendant resided in the District to which removal was sought, and because defendant did not specifically pray for removal of cause; *held* that the Circuit Court had jurisdiction to determine whether the case was removable and that mandamus would not lie to compel the Circuit Judge to remand the cause.

THE facts are stated in the opinion.

Mr. Arthur Crownover, Mr. Isaac W. Crabtree and Mr. William L. Myers for petitioner.

Mr. William L. Granbery for respondent.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Gruetter brought an action in the Circuit Court of Franklin County, Tennessee, against the Cumberland Telephone and Telegraph Company to recover \$20,000 for violation of § 2 of chap. 66 of the Acts of 1885, which is § 1842 of Shannon's Code of Tennessee, for the unjust discrimination by defendant against plaintiff set up in the declaration. The section is as follows:

"Every telephone company doing business within this

217 U. S.

Opinion of the Court.

State, and engaged in a general telephone business, shall supply all applicants for telephone connection and facilities, without discrimination or partiality, provided such applicants comply, or offer to comply, with the reasonable regulation of the company; and no such company shall impose any condition or restriction upon any such applicant that are not imposed impartially upon all persons or companies in like situations, nor shall such company discriminate against any individual or company in lawful business by requiring, as condition for furnishing such facilities, that they shall not be used in the business of the applicant or otherwise, under penalty of \$100.00 for each day such company continues such discrimination and refuses such facilities after compliance or offer to comply with the reasonable regulations, a time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused."

Defendant filed a petition to remove the case to the Circuit Court of the United States for the Middle Division of the Middle District of Tennessee, to which plaintiff demurred on the ground that it was an action to recover a penalty, and therefore was not removable. The demurrer was heard by the Circuit Judge of Franklin County, who sustained it, dismissed the petition, and refused to remove the case. Defendant obtained a certified copy of the record and filed the same in the Circuit Court of the United States for the Sixth Circuit, and plaintiff moved to remand the case because it was a suit to recover a penalty and the action was not of a civil nature; because the petition and record did not show that the suit was sought to be removed to the Circuit Court of the United States for the district in which either the plaintiff or the defendant resided; and because the defendant did not specifically pray for the removal of the cause.

The Circuit Court upon hearing filed a memorandum opinion considering and overruling all of the grounds

presented to sustain the motion and denied the motion to remand, whereupon Gruetter filed a petition for writ of mandamus directing the District Judge of the United States for the Middle Division of the Middle District of Tennessee, holding the Circuit Court for that division, to remand the suit to the Circuit Court of Franklin County, State of Tennessee. Leave to file this petition was granted and a rule to show cause was thereon entered, to which the judge filed his return, stating that the motion of plaintiff to remand was denied for the reason that in respondent's opinion the several grounds of the petitioner's motion were not well founded in law, and that under the facts and pleadings presented by the record the Circuit Court of the United States for the Middle District of Tennessee, sitting at Nashville, had jurisdiction of said cause.

There was no controversy as to there being diversity of citizenship. The defendant was a corporation of Kentucky and plaintiff was a citizen of Tennessee. Inasmuch as we are of opinion that the Circuit Court of the United States had jurisdiction to determine the questions presented, we hold that mandamus will not lie. The final order of the Circuit Court cannot be reviewed on this writ. *In re Pollitz*, 206 U. S. 323.

Rule discharged and petition dismissed.